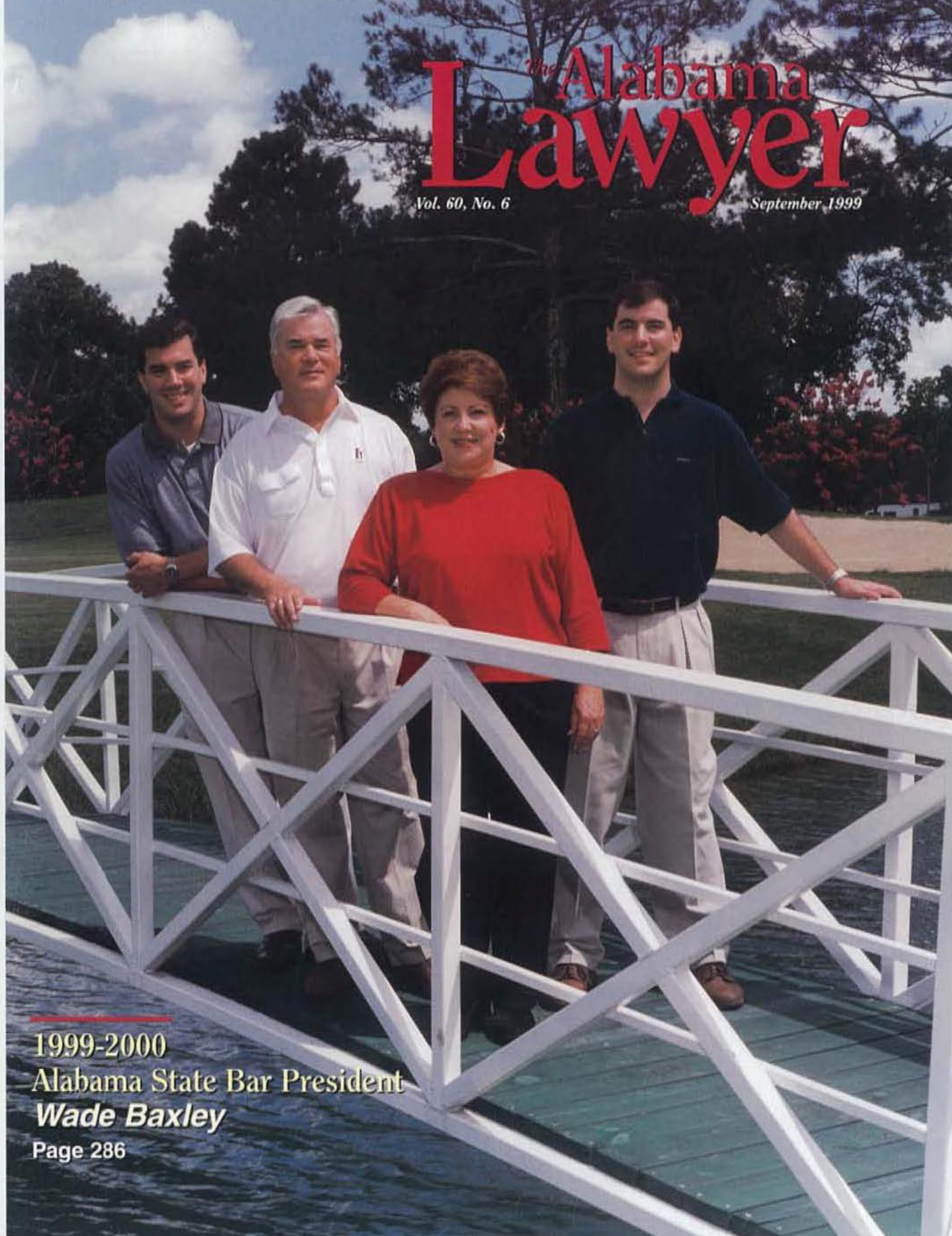

The Alabama Lawyer

Vol. 60, No. 6 September 1999

1999-2000
Alabama State Bar President
Wade Baxley

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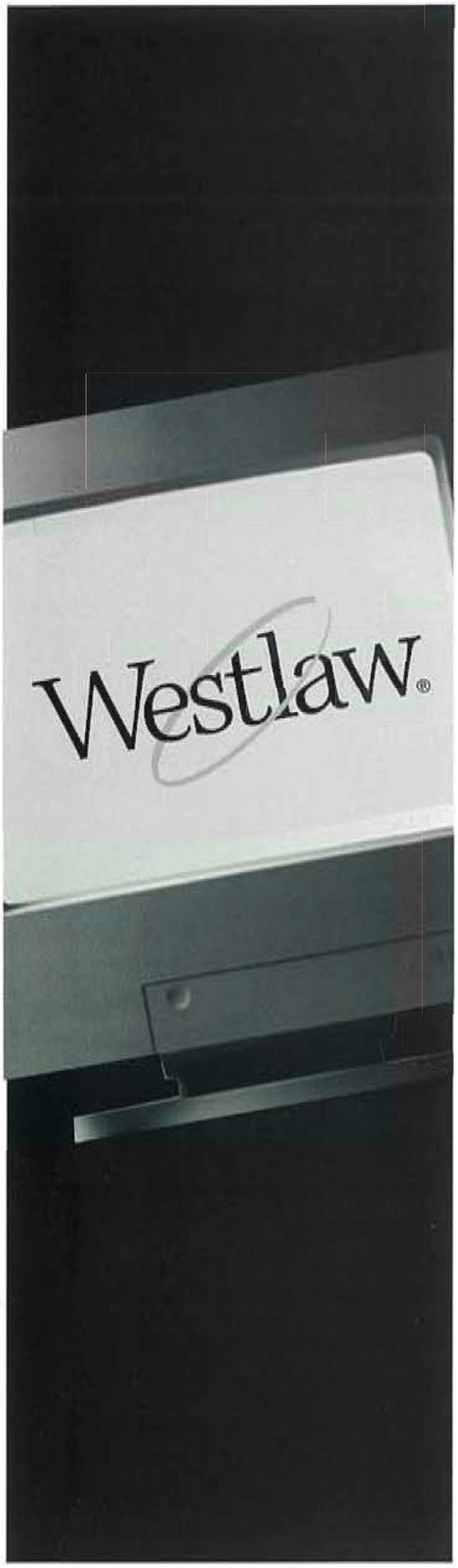

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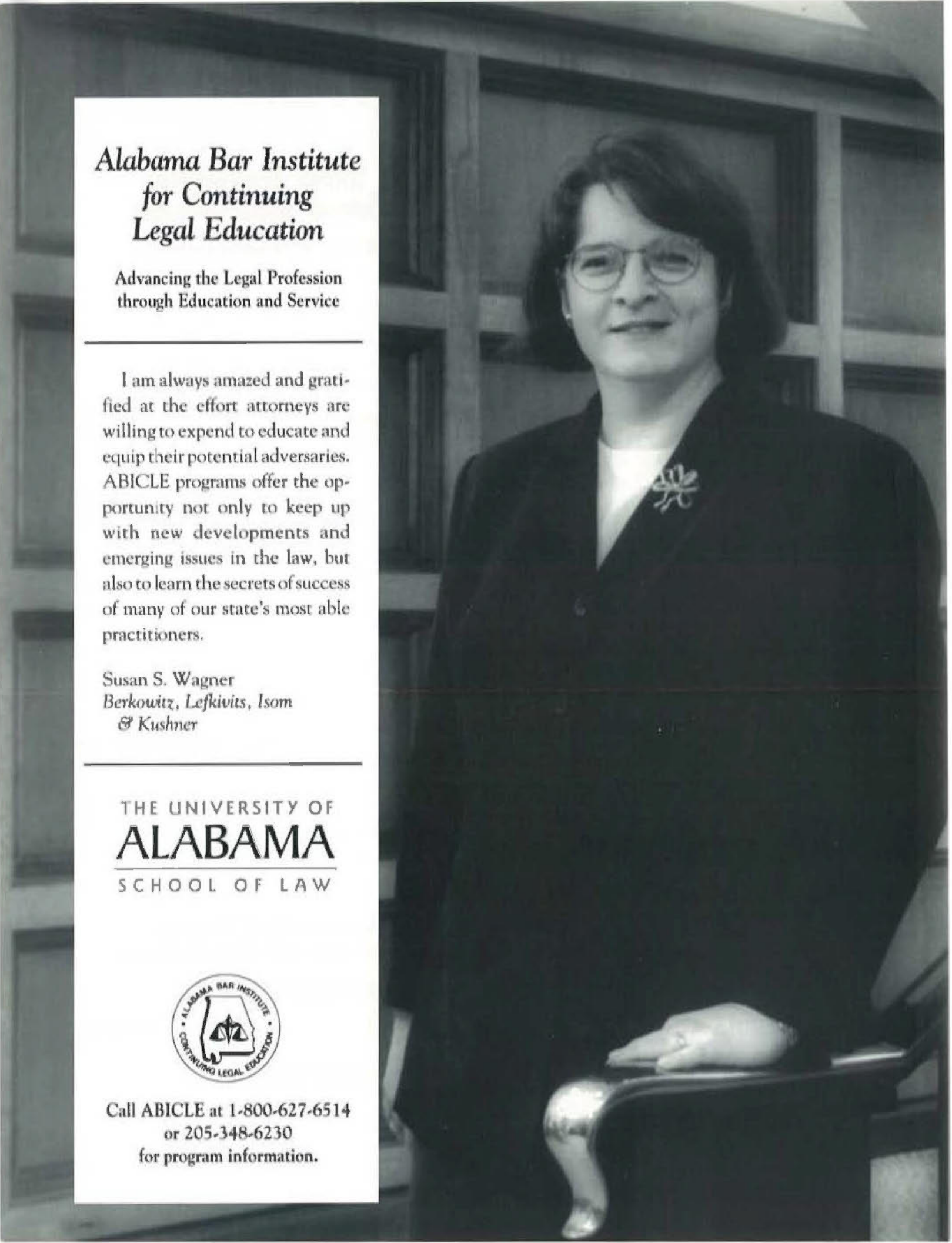

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Advancing the Legal Profession through Education and Service

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The Alabama Lawyer

Vol. 60, No. 6 September 1999

On the Cover

ASB President Wade H. Baxley and family. The cover photograph shows 1999-2000 Alabama State Bar President Wade H. Baxley and his family on the Dothan Country Club golf course. From left to right are son Hamp Baxley, 27, a second-year student at the University of Alabama School of Law; Mr. Baxley; wife Joan Baxley; and son Keener Baxley, 25, a mutual fund accountant with Waddell & Reed Financial Services in Kansas City, Missouri. Mr. Baxley is the senior partner in the firm of Ramsey, Baxley & McDougle in Dothan.

—Photograph by Gaines Photo Service

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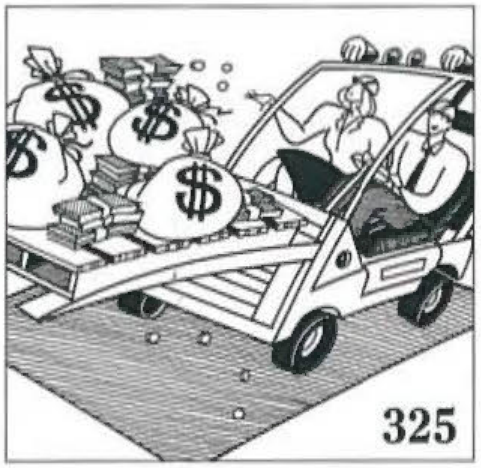

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DEPARTMENTS

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President's Page

By Wade Baxley

Back to the Future

Wade Baxley

As we approach the end of one century and the beginning of another in this fiscal year of the Alabama State Bar, I have debated whether to spend my initial "President's Page" talking about the future of our profession or discussing the past. I conclude that we must prepare ourselves for the 21st century by reflecting deeply on where we have been.

There is no question that we, as lawyers, stand on the shoulders of giants who have helped elevate and fine tune our state bar so that it is generally and consistently recognized as one of the leading bars in the nation. Over the past decade, through my service as a state bar delegate to the American Bar Association House of Delegates and as president-elect of the Alabama State Bar, I have had the opportunity to meet formally and socially with representatives of state, local and specialty bars from all over the United States. It did not take long for me to realize that our state bar is held up as a model by our brother and sister organizations in other states.

When I speak of "giants" in the legal profession, I am not only referring to the state bar leadership over the past 99 years, but also of the leadership of lawyers in our local communities. Although the image of lawyers as a whole seems to be taking a beating from the public and the media when viewed on a national basis, I believe that the opposite is true in most Alabama cities and towns. In Dothan, lawyers generally have been among the most highly respected leaders of the community. I remember with pride Dothan lawyers who influenced me over the years, including J. Robert Ramsey, L. A. Farmer, Jr., W. Guy Hardwick, H. Dwight McInish, James Floyd Martin, Alto V. Lee, III, J. Theodore Jackson, and my father, Circuit Judge Keener Baxley. Although we did not know it as a "mentoring program" in the Wiregrass area of Alabama at the time, for years older lawyers have advised and assisted younger lawyers in the practice of law. You really understand the meaning of "mentoring" when you hear someone like United States District Judge Myron Thompson publicly thanking retired attorney Dwight McInish for being there to advise and assist him as a young attorney in Dothan. The mentoring of younger lawyers and the promotion of professionalism must continue if we intend to secure the respect of the public for our judicial system.

In 1968, I was admitted to practice law by the Supreme Court of Alabama. Over the past 30 years, I have witnessed a number of procedural, substantive and technological changes. We have gone from common law pleading to notice pleading under the Alabama Rules of Civil Procedure. The NIL has been abolished and the UCC established to govern commercial transactions. Uniform model statutory codes are now the standard instead of the exception. In 1982, the state bar adopted Mandatory Continuing Legal Education (MCLE) rules requiring 12 hours of CLE in order for a lawyer to maintain a law

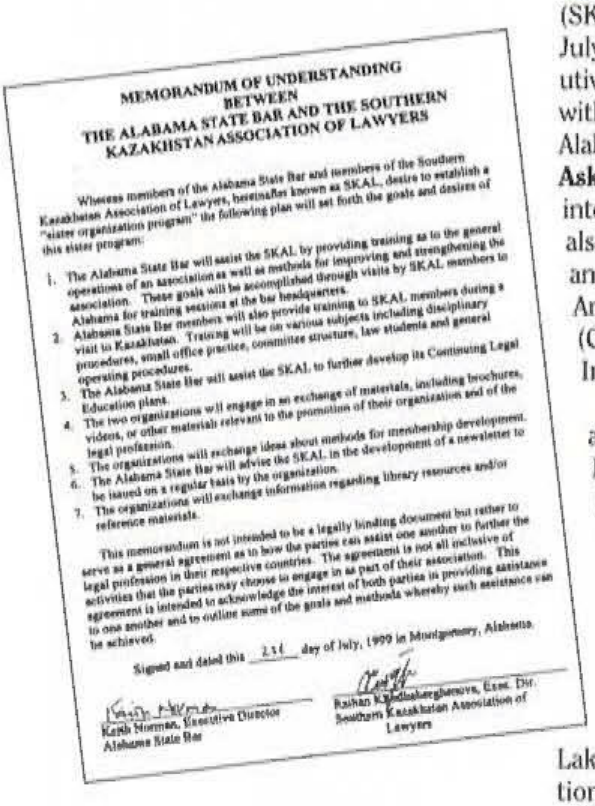
license from year to year. Computers have replaced the old IBM Selectric typewriters which were formerly the state of the art. Photocopiers of all makes, models and speeds are now utilized to make duplicates of briefs, pleadings, file copies, etc., instead of carbon paper copies. Books are becoming obsolete for rapid access to legal research. Advertising by lawyers on radio, television and billboards is no longer banned and has become widely utilized. With the advent of voice mail, there is a 50-50 chance of talking with a live person by telephone in a major law firm. Unfortunately, it appears that the practice of law in recent years is more of a business than a profession.

Most of these changes (especially the technological ones) are a welcome relief, but some remain questionable. In any event, the purpose of the legal profession essentially remains unchanged over the past century. As stated in the preamble of the Alabama Rules of Professional Conduct, "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." The officers, committee members and permanent staff leadership of the Alabama State Bar over the past century have placed our state bar in the forefront of organized bars throughout the nation. We now have the burden and responsibility to continue this tradition as we approach and enter the 21st century. I intend to emphasize service and professionalism during my term as president as well as to promote the excellent programs available to Alabama lawyers through our state bar. Additionally, I will follow the lead of past Presidents Dag Rowe and Vic Lott and continue to promote the inclusion of specialty bar groups in state bar meetings and activities. As mandatory members of a unified integrated bar, we have too many common interests in areas of judicial reform, professionalism, multidisciplinary practice and the administration of discipline to allow a division based upon personal interests of specialty groups to threaten our profession as a whole.

I look forward to serving you as president and to working with the members of the Board of Bar Commissioners and the administrative staff of the bar during this 1999-2000 fiscal year. ■

EXECUTIVE DIRECTOR'S REPORT

By Keith B. Norman



MEMORANDUM OF UNDERSTANDING
BETWEEN
THE ALABAMA STATE BAR AND THE SOUTHERN KAZAKHSTAN ASSOCIATION OF LAWYERS

Whereas members of the Alabama State Bar and members of the Southern Kazakhstan Association of Lawyers, hereinafter known as SKAL, desire to establish a "sister organization program" the following plan will set forth the goals and desires of this sister program:

1. The Alabama State Bar will assist the SKAL by providing training as to the general operations of an association as well as methods for improving and strengthening the association. These goals will be accomplished through visits by SKAL members to Alabama for training sessions at the bar headquarters.
2. Alabama State Bar members will also provide training to SKAL members during a visit to Kazakhstan. Training will be on various subjects including disciplinary procedures, small office practice, committee structure, law students and general operating procedures.
3. The Alabama State Bar will assist the SKAL to further develop its Continuing Legal Education plans.
4. The two organizations will engage in an exchange of materials, including brochures, videos, or other materials relevant to the promotion of their organization and of the legal profession.
5. The organizations will exchange ideas about methods for membership development.
6. The Alabama State Bar will advise the SKAL in the development of a newsletter to be issued on a regular basis by the organization.
7. The organizations will exchange information regarding library resources and/or reference materials.

This memorandum is not intended to be a legally binding document but rather to serve as a general agreement as to how the parties can assist one another to further the legal profession in their respective countries. The agreement is not all inclusive of activities that the parties may choose to engage in as part of their association. This agreement is intended to acknowledge the interest of both parties in providing assistance to one another and to outline some of the goals and methods whereby such assistance can be achieved.

Signed and dated this 21st day of July, 1999 in Montgomery, Alabama.

Keith Norman, Executive Director
Alabama State Bar

Raihan Khobdabergenova, Exec. Dir.
Southern Kazakhstan Association of Lawyers

SKAL II

Keith B. Norman

Three representatives of the Southern Kazakhstan Association of Lawyers (SKAL) paid us an extended visit this past July. **Raihan Khobdabergenova**, the executive director of the association, visited with us in March. She returned to Alabama in July with private attorney **Askar Yemeshev** and law student and interpreter **Tatiana Chernobil**. Tatiana also works as a translator, interpreter and program assistant with the American Bar Association's CEELI (Central and East European Law Initiative).

Our visitors had the opportunity to attend the Alabama State Bar Annual Meeting in Birmingham and return to Montgomery to spend a week learning more about our judicial system and the operations of the Alabama State Bar. The additional time in Montgomery allowed Raihan, Askar and Tatiana to have meals at private homes, enjoy boat rides on the Alabama River and Lake Martin and ask and answer questions in less formal surroundings.

Although there was more time during this visit for informal gatherings than was the case during their last visit, there was still much for these bar leaders to observe and learn. United States **Magistrate Judge Vanzetta Penn**

Raihan Khobdabergenova, on her second trip to Montgomery, visits with U. S. District Court Judge Myron Thompson.

McPherson, Middle District of Alabama, planned an informative program and luncheon at the federal court. Our bar friends had a chance to sit in on part of a civil jury trial in **Chief Judge Harold Albritton's** courtroom. Prior to the trial, Chief Judge Albritton took time to explain the case to our guests and answer questions. Judge McPherson also arranged for our guests to observe, as a part of a criminal case, a mock sentencing hearing. During their visit to the middle district, our friends from Kazakhstan were welcomed by many of the federal court family including **Judge Myron Thompson**, United States

Askar Yemeshev (far right), a Kazakhstan attorney, shares a laugh with U. S. District Court Judge Harold Albritton, U. S. Attorney Redding Pitt and Assistant U. S. Attorneys Leura Garrett and Laura Wright.

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Fall 1999 Seminars

September	10	Developments and Trends in Health Care Law 1999
	17	Prosecuting and Defending DUI Cases in Alabama Courts
	24	Probate Practice Fundamentals
October	1	10th Annual Bankruptcy Law Seminar: Bankruptcy Fundamentals
	8	Managing The Successful Law Practice Today
	15	Selecting and Influencing Your Jury with Susan E. Jones
	22-23	Fundamental Lawyering Skills
	29	Y2K Litigation
November	5	13th Annual Workers' Compensation Seminar
	11	Choice of Entity: Immediate and Long-Term Implications for Your Client
	19	Essential Advocacy Skills: The Truth, The Whole Truth, and Nothing But The Truth with Stephen D. Easton
December	3	Persuasive Legal Writing with Steven D. Stark
	9	Employment Law Update
	10	"Hot Topics" in Civil Litigation - Mobile
	17	"Hot Topics" in Civil Litigation - Birmingham
	29-30	CLE By The Hour

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Attorney **Redding Pitt** and **Magistrate Judge John Carroll.**

In addition to the visit to the federal court, our visitors wanted to return for a visit to the Supreme Court and State Law Library. **Mary Edge Horton** arranged for them to tour the library and judicial building. The lawyers in Kazakhstan recognize that for the rule of law to flourish there, establishing accessible and well-maintained law libraries is essential. Although there were no jury trials scheduled at the Montgomery Circuit Court for the week of their visit, Court Administrator **Bob Merrill** arranged for our three guests to observe district court proceedings before **Judge Lynn Bright** and to learn about mediation, which is being offered in the district court of Montgomery.

When our Kazakhstan friends visited in March, their schedule was so full with formally planned activities that there was little time for social activities. This time, however, our visitors' schedule included frequent opportunities to visit in homes and meet a variety of people. **Susan Andres** and **Laura Calloway** of the state bar staff hosted our guests in their homes. Laura also arranged for Raihan, Askar and Tatiana to ride a pontoon boat on the Alabama River and to visit several of Montgomery's historical landmarks. Other state bar staff who volunteered their time for tours or social activities were **Judy Keegan, Linda Lund, Ed Patterson,** and **Kim Oliver Ward.** Montgomery attorney **Jim Debardelaben** invited our friends to his Lake Martin home for boating and swimming and a barbecue. Jim had traveled to St. Petersburg, Russia several years ago shortly after the fall of the "Iron Curtain" and the breakup of the Soviet Union.

The visit culminated with the signing of a "Memorandum of Understanding" between SKAL and the Alabama State Bar. This memorandum formalizes the relationship between our two bars and our efforts to help SKAL grow in the years to come as a service organization for the legal profession. ■

Remarks of Fred D. Gray

Pepperdine University School of Law Commencement Convocation

Receipt of Honorary Doctor of Laws Degree
Malibu, California • May 21, 1999

Mr. Hernandez, President Davenport, Dean Lynn, members of the Board of Regents, graduates, fellow guests, ladies and gentlemen:

I am honored, humbled and elated by the honor you have bestowed upon me today. It is a long way from Washington Park, a ghetto of Montgomery, Alabama where I was born, and Tuskegee, Alabama, within the Black Belt of that state, where I have lived for a substantial part of my adult life, to Pepperdine University in Malibu, California, nestled between the Pacific Ocean and the majestic mountains. I am humbly grateful that you have seen fit to honor me with the highest honor of this prestigious University.

Fred D. Gray

If I have been able to assist in destroying the walls of segregation in transportation, voter registration, education, health care with respect to the infamous Tuskegee Syphilis Study, and in other areas, it is because I had a Christian mother and a Christian wife for 40 years. I only wish they could be here to share this occasion.

It has been the lawsuits that really changed conditions in the South and in this nation. The demonstrations were important in getting mass participation and public attention. However, "it was the courts' decisions that made the law, created and interpreted the laws, and gave the rights which made it possible for all Americans to enjoy the rights and privileges which were written in our Constitution many years ago." Unfortunately, historians, for the most part, have written lawyers out of the Civil Rights Movement.

So, today, I am elated to accept this award on behalf of *all the lawyers of the Civil Rights Movement* who worked hard to change the social and racial landscape of this country.

I also humbly accept this award on behalf of the unsung heroes, many of whom have died and others who yet survive, whose names never appear in print; whose faces never appear on television and, for the most part, are not known to exist. If I were to ask, "Do you know Claudette Colvin?" very few hands would go up. In March 1955, I represented Claudette Colvin in Montgomery, Alabama. At that time she was a 15-year-old African American girl arrested for refusing to give up her seat to a white man, nine months before Mrs. Rosa Parks was arrested. Claudette now lives in Bronx, New York. She gave the moral courage to all of us, including Mrs. Parks, for whom legislation was passed a few weeks ago awarding her the Congressional Gold Medal. If there had been no Claudette Colvin, there may very well have been no Mrs. Rosa Parks as we know her today, no Montgomery Bus Boycott as it later developed and no Martin Luther King, Jr. as he subsequently became a world leader.

Finally, I say to these outstanding graduates, you have a tremendous opportunity. You are blessed with wisdom, knowledge and education. Find your niche in life. Find the wrongs that exist and seek to correct them. Work in the impoverished areas and seek to make them boom. Use your law degree to make a difference. ■

Fred D. Gray is a 1954 admittee to the Alabama State Bar and practices with the Tuskegee firm of Gray, Langford, Sapp, McGowan, Gray, & Nathanson.

BAR BRIEFS

• The **Baldwin County Bar Association** elected new officers at its annual meeting for the 1999-2000 term. They are: president, **W. Beatty Pearson** of Daphne; vice-president, **Daniel G. Blackburn** of Bay Minette; and secretary-treasurer, **Oliver J. Latour, Jr.**, of Foley.

• Birmingham attorney **Mark White** and retired **Judge Richard Holmes** of Montgomery were honored at the 1999 Alabama State Bar Annual Meeting in Birmingham for their contributions to turning around negative judicial campaigns. The honorees were each presented with a Commissioners' Award for helping persuade candidates for local and state judicial offices to run fair and non-negative campaigns during the 1996 election period. White served as chair of the 12-member oversight committee of the Alabama Supreme Court's Standing Committee on Rules of Conduct and Canons of Judicial Ethics. Judge Holmes, retired from the court of civil appeals, served as vice-chair.

Judge Richard Holmes (center) and Mark White (right) receiving award from Vic Lott

The committee fielded over 350 inquiries during the election cycle and, as a unified voice, bolstered both the public's respect and the candidates'.

• **Justice Hugh Maddox**, senior associate justice of the Supreme Court of Alabama, has been elected to the Board of Trustees of the American Inns of Court Foundation. The American Inns of Court, composed of over 20,000 members in 48 states and the District of Columbia, examine issues related to ethics, professional conduct and civility in the field of law. Currently, there are more than 300 Inns throughout the United States.

Justice Maddox

Justice Maddox has long been a leader within the American Inns of Court movement. He founded and is a past president of the Inn that recently was renamed in his honor, the Hugh Maddox American Inn of Court of Montgomery, and has played a major role in the establishment of numerous other Inns throughout Alabama.

Tallapoosa County Bar Association officers Moncus, Reynolds and Treadwell

• The 1999-2000 officers of the **Tallapoosa County Bar Association** are:

President: Mark Allen Treadwell, III
Vice-President: Robin Reynolds
Secretary/Treasurer: Catherine Moncus

• The National Board of Trial Advocacy recently announced that **Robert F. Prince** of Tuscaloosa has successfully achieved board certification as a civil trial advocate through NBTA. Founded in 1977, the National Board of Trial Advocacy filled a substantial void in the legal profession by creating the first attorney certification program.

• **Joseph M. Farley**, counsel to Balch & Bingham, LLP, recently was presented with the Henry DeWolf Smyth Nuclear Statesman Award. This award, jointly established in 1972 by the American Nuclear Society and the Atomic Industrial Forum, has become a significant annual tradition and represents recognition of an individual who has given outstanding service in developing and guiding the commercial applications of nuclear energy.

• The 1999 Alabama State Bar Local Bar Award of Achievement, which recognizes local bar associations for their outstanding contributions to their communities, was presented to the **Morgan County Bar Association** at the ASB Annual Meeting in Birmingham.

Led by President **J. Glynn Tubb** of the firm of Eyster, Key, Tubb, Weaver & Roth, the MCBA participated in the Partners in Education program sponsored by the ASB. The state bar staff conducted a training seminar for eighth-grade teachers, principals and 36 lawyers from the MCBA, beginning in October 1998. Each lawyer taught designated subjects on a minimum of four occasions during the academic year.

The culminating event for the Partnership Program was held in conjunction with Law Day 1999, when approximately 600 eighth-grade students attended oral arguments before the Supreme Court of Alabama, held in the Decatur High School auditorium. The MCBA also invited 400 12th-grade students from area high schools, thereby exposing 1,200 students to an introductory course on the justice system as it occurs at the appellate court level.

Chief Justice Perry Hooper

• Alabama Supreme Court **Chief Justice Perry Hooper**, **Associate Justice Harold See**, ASB Past President **Vic Lott**, Birmingham attorney **Carol Ann Smith**, and **Keith Norman**, ASB executive director, recently attended the National Conference on Public Trust and Confidence in the Judicial System in Washington, D.C. Five hundred leaders from state and federal courts, the bar, the media and citizens' groups convened in this first-ever conference addressing the serious issue of public trust in the justice system.

The conferees addressed five questions: How serious is the overall issue of public trust? What are the critical issues affecting public trust? What are the most effective strategies to deal with the critical issues? What are the barriers to effectuating these strategies? What actions can be taken at the national level to help surmount the barriers and support effective strategy implementation?

Vic Lott

Keith Norman

Forty-six states sent teams to the conference as did Guam and Puerto Rico. Those addressing the conference and leading the workshops included United States Chief Justice William Rehnquist, Professor Charles Ogletree of Harvard Law School, Mario Cuomo, former governor of New York, and Associate Supreme Court Justice Sandra Day O'Connor.

•

New York University School of Law recently honored alumnus United States **District Court Judge Sam C. Pointer, Jr.** with a dinner in New York. Pointer, presiding federal judge for the Northern District of Alabama, has been on the bench for 29 years. He has earned a national reputation with his handling of complex legal cases, such as the nationally consolidated silicone breast implant litigation that he has overseen since 1992.

Judge Pointer

MEMORIALS

Edwin Cary Page, Jr.

The Alabama State Bar lost one of its most distinguished and senior members on January 21, 1999, upon the death of Edwin Cary Page, Jr. of Evergreen.

Mr. Page, a scion of many prominent pioneer families, was born in Evergreen on October 12, 1906, the son of Edwin C. Page, Sr. and Jessie Cleere Page. His father was a noted trial lawyer practicing extensively throughout south Alabama and in 1911 appeared in the Circuit Court of Wayne County, Michigan as lead counsel in a case involving title to many thousand acres of land in Monroe and Conecuh counties, whose owners lived in Michigan. His mother, Jessie Cleere Page, was a native of Russellville, Alabama, who met her husband while they both were students at the University in 1901.

Mr. Page attended public schools in Evergreen and graduated from the State Secondary Agricultural School for the 2nd Congressional District located at that time in Evergreen. He entered the University in the fall of 1923 at the age of 16 and graduated in 1928, having received both BA and LLB degrees. Admitted to the bar shortly after his graduation and spurning several offers to practice with attorneys in Jasper, Alabama and Pensacola, Florida, he opened his office in Evergreen later the same year where he quickly became known as a fine lawyer. Possessed of a keen and analytical mind, he was able to establish a reputation for giving sound legal advice. During his time of practice from 1928 through 1999, a tenure interrupted only by his service in the United States Navy during World War II and a short period of time when he practiced law with the late B.E. Jones, he served as county solicitor of Conecuh County from 1934 through 1959, as bar commissioner of the Alabama State Bar from 1965 through 1981, as chairman of the Conecuh County Democratic Executive Committee for several years, and as an elder in the Evergreen Presbyterian Church and a Rotarian. He was an excellent source of information on the land and history of Conecuh County. Much of Mr. Page's library and office furnishings are housed in the Monroe County Museum, in Monroeville, Alabama.

Mr. Page is survived by one daughter, Cary Page, and five grandchildren of Fairfax, Virginia. Predeceasing him were his wife; a daughter, Mary Edward Hansen; his parents; and two brothers, Samuel Wilson Page and Perryman Page. His colleagues in the bench and bar and his many friends mourn his passing and the passing of an era in the legal community of this section of the State.

— Richard D.C. Nix, president
Conecuh County Bar Association

Don Alan Howard

Whereas, the Huntsville-Madison County Bar Association comes together to pay tribute to Don Alan Howard, who passed away on May 29, 1999; and,

Whereas, Don Alan Howard was born in Nashville, Tennessee; and attended undergraduate school at Auburn University, and the University of Alabama School of Law in Tuscaloosa, Alabama, graduating with a Juris Doctor degree; and was admitted to the Alabama State Bar in 1979; and

Whereas, Don Alan Howard began his legal career as a contract specialist with the United States Government; then entered the private practice of law in Huntsville, Alabama; he was admitted to practice before the courts of this state, the United States Court of Appeals, and the Supreme Court of the United States; and was a partner in the firm of Howard & Aldridge in Huntsville, Madison County, Alabama, from 1955 until his untimely death; and

Whereas, Don Alan Howard established a reputation as a person of integrity and dignity, and distinguished himself in all aspects of community and professional life; and earned the respect of his fellow lawyers and all who knew him; and

Whereas, Don Alan Howard is survived by his wife, Becky; three daughters, Ashley, Lauren and Kitty; a brother, David Howard, of Germantown, Tennessee; and his parents, Bud and Ann Howard, of Huntsville, Alabama; and

Whereas, Don Alan Howard was a valued and respected friend, and a distinguished citizen of this community; and it is in grateful memory and appreciation of his contributions to this community, to his profession, and to this association that this resolution be adopted; and

Whereas, this association desires to convey to his family that we have also lost a member of our family, a brother; that we share their grief and loss; and that Don's memory will last forever in our hearts and minds.

— Robert C. Gammons, president
Huntsville-Madison County Bar Association

Judge Cecil Howard Strawbridge

Judge Cecil Howard Strawbridge, who presided over the 24th Judicial Circuit for nearly a quarter of a century, died June 30 in his hometown of Vernon after a lengthy illness. He was 93.

"He was a splendid judge," said longtime Fayette attorney Louis Moore. "I succeeded him as circuit solicitor (now district attorney) when he became circuit judge in 1953. He was very helpful to me."

Moore said Strawbridge had a remarkable ability to remember names and faces. "He knew just about everybody in the circuit," Moore said. He added that Strawbridge loved gospel music and sponsored an annual singing [event] in Lamar County.

Lamar County District Judge Ed Gosa called Strawbridge "a giant in our profession."

"He had a heart for poor people," Gosa said. "He believed in equal justice and making sure it was available to all."

Strawbridge was a graduate of Lamar County High School and received his undergraduate degree from the University of Alabama in 1929. Judge Strawbridge began his legal career after receiving his law degree from the University of Alabama School of Law in 1931. He entered private practice in Vernon and later was appointed county attorney.

A love of politics prompted him to run for district attorney for the 24th Judicial Circuit, which comprises Fayette, Lamar and Pickens counties in 1942. After his election, he volunteered for the Air Force and served until the end of World War II. He returned to the circuit after his military service and twice was re-elected district attorney.

In 1952, he ran for circuit judge and won. Judge Strawbridge began that six-year term in January 1953 and would be re-elected to three more six-year terms before he reached the state's mandatory retirement at age 70.

Judge Strawbridge continued to serve as supernumerary judge to different counties in the state. He also served as vice-president and president of the Alabama Circuit Judges Association in 1967-68. In all, Judge Strawbridge held public offices for 45 years.

As part of a long and distinguished career in the legal field, Cumberland School of Law presented Judge Strawbridge with a "Cumberland Order of Jurisprudence Degree" in 1980. He also received a Certificate of Completion at the National Judicial College in Reno, Nevada, in 1980. Judge Strawbridge is also listed in Who's Who in the South, 1967-68; Who's Who in America, 1965; Personalities of the South, 1970; and Community Leaders of America, 1972.

In a public service career that spanned several decades, Judge Strawbridge served in numerous affiliations. Judge Strawbridge served as the chairman of the Board of Directors of the Lamar County Hospital while it was being built in 1952. He has also been a member of the Board of Directors of the First State Bar for over 25 years. In addition, Judge Strawbridge was a charter member of the Vernon Kiwanis Club. He was selected "Man of the Year" by the Vernon Lions Club in 1984 and was appointed as a member of the "Alliance Against Drugs" in 1989. Additionally, he was president of the Young Democratic Club in 1934 and again in 1935.

Judge Strawbridge has held memberships in the American Legion, the Jasper Royal Arch Masons Chapter 118, Vernon F&AM of Alabama Lodge #389, Birmingham Metro York Rite Bodies No. 76 R.A.M., and Zamora Temple in Birmingham. Judge Strawbridge was also inducted into Omicron Delta Kappa at the University of Alabama's 1994 Honors Day. Most recently, Judge Strawbridge was honored with the Award of Gold for his 50-year membership with the Vernon Masonic Lodge #389. He was a member of the Vernon First United Methodist Church where he served on the Administrative Council for many years.

Judge Strawbridge was very dedicated to his family. He is survived by his wife of 58 years, Autense Rector Strawbridge of Vernon; son Ronald Howard Strawbridge, Sr. and daughter-in-law Pearl Jackson Strawbridge of Vernon; daughter Shirley Strawbridge Latimer and son-in-law Phillip Gary Latimer, Sr. of Columbus, Georgia; five grandchildren, Caroline Strawbridge Rains and husband David Edwin Rains of Tuscaloosa; Ronald Howard Strawbridge, Jr. and wife Audrey Oswalt Strawbridge of Hoover; Elizabeth Leath Latimer of Atlanta, Georgia; Patricia Sarah Latimer of Auburn; Phillip Gary Latimer, Jr. of Columbus; sister Hazel Allen of Daytona Beach, Florida; and several nieces and nephews.

The legal community suffered a great loss with the passing of Judge Cecil Howard Strawbridge, an outstanding citizen and judge who played in important part in setting up the present judicial system in the state of Alabama.

— Reprinted in part from the Fayette County ***Times Journal****, July 7, 1999*

Bradley, Lee Carrington, Jr.
Birmingham
Admitted: 1921
Died: May 18, 1999

Bullock, Loren Jay
Hoover
Admitted: 1969
Died: March 31, 1999

Campbell, Orville
Birmingham
Admitted: 1976
Died: June 17, 1999

Chapman, John Henry
Cullman
Admitted: 1930
Died: April 11, 1999

Chason, Cecil Gavin
Foley
Admitted: 1940
Died: April 17, 1999

Clinton, Joseph Everett
Birmingham
Admitted: 1951
Died: December 22, 1998

Farmer, James Hubert, Jr.
Dothan
Admitted: 1966
Died: May 28, 1999

Formby, John Revel, Jr.
Wetumpka
Admitted: 1972
Died: December 21, 1998

Green, Blake A.
Dothan
Admitted: 1985
Died: July 4, 1999

Smith, Elno, Jr.
Montgomery
Admitted: 1963
Died: July 3, 1999

Stark, Mary Elder
Birmingham
Admitted: 1931
Died: July 14, 1999

Strawbridge, Cecil Howard
Vernon
Admitted: 1931
Died: June 30, 1999

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About Members, Among Firms

Due to the huge increase in notices for "About Members, Among Firms," *The Alabama Lawyer* will no longer publish address changes for firms or individual practices. *It will continue* to publish announcements of the formation of new firms or the opening of solo practices, as well as the addition of new associates or partners. Please continue to send in address changes to the membership department of the Alabama State Bar.

About Members

Bryan S. Blackwell announces the opening of his office at Charles Woods Building, 285 N. Foster Street, Suite 312, P.O. Box 2007, Dothan 36302. Phone (334) 678-7780.

Oliver Frederick Wood announces the opening of his office at South Court Square, P.O. Box 606, Hamilton 35570. Phone (205) 921-0202.

Ray T. Kennington announces the opening of his office at 100B N. Union Avenue, Ozark, 36361. Phone (334) 774-9511.

Frank B. Angarola announces his return from a seven-month tour of active duty and the re-opening of his office at 213 S. Jefferson Street, Athens, 35611. Phone (256) 233-0403.

Laurie Brock announces that she has been accepted as a postulant of the Episcopal Diocese of the Central Gulf Coast in the process toward ordination in the Episcopal Church as a priest. She will begin the Master of Divinity program at the General Theological Seminary in New York City in September 1999.

David R. Freeman announces the opening of his office at 610 Guadalupe Street, Austin, Texas 78701-2926. Phone (512) 236-0333.

Patricia Kelley Martin, P.C. announces the opening of her office at 2090 Columbiana Road, Suite 2000, Birmingham, 35216. Phone (205) 823-4552.

Nathaniel Hansford announces that he is now serving as president of **North Georgia College and State University**. His mailing address is Office of the President, Price Memorial Hall, North Georgia College & State University, Dahlonega, Georgia, 30597. Phone (706) 864-1993.

Among Firms

Pearson, Cummins & Hart, LLC. announces that **Michelle A. Meurer** has become associated with the firm. The mailing address is P.O. Box 7980, Spanish Fort, 36577. Phone (334) 626-2772.

Jim L. DeBardelaben and **Dorothy Norwood** announce that **Milton J. Westry** has joined the firm which will now be known as **DeBardelaben, Norwood & Westry, P.C.** Offices are located at 1505 Madison Avenue, Montgomery, 36107. Phone (334) 265-9306.

Chamblee & Furr, LLC announces that **William H. Weems, Jr.** has become associated with the firm. Offices are located at 5582 Apple Park Drive, Birmingham, 35235. Phone (205) 856-9111.

Donald L. Heflin of Huntsville, a member of the Alabama State Bar since

1983, has been named First Secretary and Consul to the **American Embassy** in London.

Steiner, Crum & Baker announces the continuation of the practice by the name of **Steiner-Crum, Byars & Main, P.C.**, effective July 1, 1999. Offices are located in Montgomery and Anniston.

Kenyan R. Brown announces that he is now serving as counsel to the Select Committee on Ethics, **United States Senate**. His mailing address is United States Senate, Select Committee on Ethics, Hart Senate Office Building, Room 220, Second and Constitution Avenue, Northeast, Washington, D.C., 20510-6425. Phone (202) 224-2981.

Tim Morgan, district attorney for the 23rd Judicial Circuit, announces that **Angela Redmond Debro** has joined his staff as assistant district attorney, child support division. Offices are located at 200 West Side Square, Suite 912, Huntsville, 35801. Phone (256) 532-1531.

Jill Verdeyen Deer recently joined **Bayer Properties** as vice-president of development and general counsel. Offices are located at 2100 16th Avenue, South, Suite 111, Birmingham, 35205. Phone (205) 939-3111.

Hill, Hill, Carter, Franco, Cole & Black, P.C. announces that **Elizabeth Brannen Carter** has become a member and **Erika Perrone Tatum** has joined the firm as an associate. Offices are located at 425 S. Perry Street, Montgomery, 36104. The mailing address is P.O. Box 116, Montgomery, 36101. Phone (334) 834-7600.

Lange, Simpson, Robinson & Somerville announces that **William L. Waudby** has become a partner with the firm, **Eugenia Hofammann Mullins** has joined as *of counsel* and **Valerie T. Kisor**, **Todd M. Higney**, **J. Eric Miles**, **Derek Atchison**, and **Jacquelyn A. Gonzales** have become associated with the firm. Offices are located in Birmingham, Huntsville, Montgomery and Anniston. Phone 800-239-4999.

Sadler, Sullivan, Sharp & Van Tassel, P.C. announces the change of the firm name to **Sadler Sullivan, P.C.** The firm also announces that **Marc C. Dawsey** has become associated with the firm. Offices are located at 2500 SouthTrust Tower, 420 N. 20th Street, Birmingham, 35203-5203. Phone (205) 326-4166.

Berkowitz, Leftkovits, Isom & Kushner announces that **Lee T. Clanton** and **Andrew R. Chambless** have become associated with the firm. Offices are located at 1600 SouthTrust Tower, 420 N. 20th Street, Birmingham, 35203. Phone (205) 328-0480.

Walter B. Calton, Michael A. Rutland and **John P. Haygood** announce the formation of **Calton, Rutland & Haygood, LLC** with offices located at 312 E. Broad Street, Eufaula, 36027. Phone (334) 687-2407.

Constangy, Brooks & Smith, LLC announces that **Dana L. Thrasher** has become a partner in the firm. Offices are located at 1901 6th Avenue, North, Suite 410, Birmingham, 35203. Phone (205) 252-9321.

Wainwright & Pope, P.C. announces that **Steven T. McMeekin** has joined the firm. Offices are located at Two Metroplex Drive, Suite 305, Birmingham, 35209.

C. Alan Burdette announces the formation of **Burdette & Burdette, P.C.** with his sister, **L. Brooks Burdette**. Offices are located at 1930 Edwards Lake Road, Suite 126, Birmingham, 35235. Phone (205) 661-1800.

Carr, Alford, Clausen & McDonald, LLC announces that **Jean M. Powers** has become a partner with the firm and that **M. Lauren Lemmon**, **Thomas M. Rockwell** and **Christina M. Adcock** have joined the firm as associates.

Beasley, Wilson, Allen, Crow & Methvin, P.C. announces that **Robert L. Pittman** has become a shareholder of the firm and that **Dana G. Taunton**, **Scarlette M. Tulley**, **J. Mark Englehart**, **Kendall C. Dunson**, **Scott T. McArdle**, **Clinton C. Carter**, **Tiernan W. Luck, III**, and **Karen L. Mustin** have become associated with the firm. The firm name has been changed to **Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.** Offices are located at 218 Commerce Street, Montgomery, 36103. Phone (334) 269-2343.

Allyson C. Pearce and **Andrew Bailey** announce the formation of **Pearce & Bailey, LLP**. Offices are located at 222 S. Alston Street, Foley, 36536. Phone (334) 971-2676 or 1-877-LATELAW.

Bender & Agboola, LLC announces that **Vicki Gayle Bradley** has joined the firm and the firm name has changed to **Bender, Agboola & Bradley, LLC**. Offices are located at 711 N. 18th Street, Birmingham, 35203. Phone (205) 324-2120.

W. Stanley Garner and **W. Stanley Garner, Jr.** announce the formation of **Garner & Garner, LLC.** Offices are located at 100A N. Union Avenue, Ozark, 36361. Phone (334) 774-9511.

Carr, Allison, Pugh, Howard, Oliver & Sisson, P.C. announces that **Caroline T. Pryor** has joined the firm and will practice in the Mobile office. Offices are also located in Birmingham and Florence.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C. announces that **Bert J. Miano** and **Paul O. Woodall, Jr.** have become associates of the firm. Offices are located at Suite 1900, SouthTrust Tower, 420 N. 20th Street, Birmingham, 35203. Phone (205) 328-1900.

Bond, Botes, Thornton & Carlson, P.C. announces that **David S. Clark** has become associated with the firm. Offices are located at 671 S. Perry Street, Suite 503, Montgomery, 36104. Phone (334) 264-3363.

Cabaniss, Johnston, Gardner, Dumas & O'Neal announces that **Michael E. Turner** has become an associate with the firm. Offices are located in Birmingham and Mobile.

Leitman, Siegal & Payne, P.C. announces that **R. Link Loegler** has become associated with the firm. Offices are located at 600 N. 20th Street, Suite 400, Birmingham, 35203. Phone (205) 251-5900.

Norman, Fitzpatrick, Wood & Kendrick announces that **Celeste K. Poteat** has become an associate with the firm. Offices are located at Liberty National Building, Suite 1500, 2001 Third Avenue, South, Birmingham, 35233. Phone (205) 328-6643.

Norman J. Gale, Jr. and **Jeffrey N. Gale** announce the formation of **Gale & Gale, P.C.** Offices are located at 917 Western America Circle, Suite 205, Mobile, 36609. Phone (334) 460-0400.

Samford, Denson, Horsley & Pettey announces that **Emil F. Wright, Jr.** has

joined the firm as an associate and **James E. Bridges, III** has joined as a partner. The firm's new name will be **Samford, Denson, Horsley, Pettey & Bridges**. Offices are located at 709 Avenue A, P.O. Box 2345, Opelika, 36803-2345. Phone (334) 745-3504.

Lewis, Brackin & Flowers announces the change of the firm name to **Lewis, Brackin, Flowers & Hall**. Offices are located at 265 W. Main Street, Dothan, 36301. Phone (334) 792-5157.

Robert P. Reynolds, P.C. announces that **Rachel L. Webber** has joined the firm as an associate in the Tuscaloosa office. Offices are located in Tuscaloosa and Huntsville. Phone (256) 534-6789.

Gordon, Lathum & Burke announces that **Martin E. Burke** has become associated with the firm. Offices are located at 2105 3rd Avenue, North, Birmingham, 35203-3314. Phone (205) 252-8838.

Burgess & Hale LLC and **Lamar, Miller & Norris** announce their merger, with the new firm name of **Lamar, Burgess, Hale, Miller, Norris & Feldman, P.C.** Offices are located at 300 Financial Center, 505 20th Street, North, Birmingham, 35203. Phone (205) 326-2945.

Dempsey, Steed, Stewart & Keever, P.C. announces the change of its name to **Dempsey, Steed & Stewart, P.C.** Offices are located at 100 RiverPoint Corporate Center, Suite 205, Birmingham, 35243. Phone (205) 970-0034.

Joseph A. Morris, Tracy W. Cary and **Steven D. Fischer** announce the formation of **Morris, Cary & Fischer, LLC.** Offices are located at 170 E. Main Street, Dothan, 36301. Phone (334) 792-1420.

Walston, Wells, Anderson & Bains, LLP announces that **Jerry Dean Hillman** has become a partner in the firm and that **Alan M. Warfield, Benjamin E. Waller** and **Tracy H. Beauchamp** have become associated with the firm. Offices are located at Financial Center, 505 20th Street, North, Suite 500, Birmingham, 35203. Phone (205) 251-9600.

Janecky, Newell, Potts, Wilson, Smith & Masterson, P.C. announces that **James W. Killion** and **Benjamin H. Albritton** have become members of the firm and **Harry V. Satterwhite, Edward P. Rowan** and **C. Mark Erwin** have become associated with the firm. The firm's name has been changed to **Janecky Newell, P.C.** Offices are located in Mobile, Pensacola and Birmingham.

Price Law Firm, P.C. announces that **George D. Flowers** has joined the firm as an associate. Offices are located at 217 Randolph Avenue, Huntsville, 35801. Phone (256) 536-6000.

William H. Robertson, Paul W. Brunson, Jr. and **Gary R. New** announce the formation of **Robertson, Brunson & New LLC**. Offices are located in Clayton and Eufaula.

Arthur F. Fite, III and **William J. Miller** announce the formation of **Fite & Miller, LLC**. Offices are located at 400 SouthTrust Bank Building, Anniston, 36201. Phone (256) 231-9330.

Lucas, Alvis, Wash & Petway, P.C. announces that D. Bruce Petway has become a shareholder with the firm and that **Kenneth D. Graves** has become associated with the firm. Offices are located in Birmingham, Sheffield and Mobile.

BUILDING ALABAMA'S COURTHOUSES

By Samuel A. Rumore, Jr.

(Photo date unknown) Courthouse was completed in 1905—Photo provided by the Dothan Landmarks Foundation

Houston County

Established: 1901

The following continues a history of Alabama's county courthouses—their origins and some of the people who contributed to their growth. If you have any photographs of early or present courthouses, please forward them to: Samuel A. Rumore, Jr., Miglionico & Rumore, 1230 Brown Marx Tower, Birmingham, Alabama 35203.

Houston County

Houston County was the 67th and final county created in Alabama. It also has the distinction of being the only county created in the 20th Century. The Constitution of 1901 provided for the establishment of Houston County in Section 39 which reads, "that out of the counties of Henry, Dale, and Geneva, a new county of less than 600 square miles may be formed under the provisions of this article, so as to leave said counties of Henry, Dale, and Geneva with not less than 500 square miles each." The legislature created the new county on February 9, 1903 and named it for Governor and Senator George S. Houston of Limestone County.

George Smith Houston, a distant kinsman of Sam Houston of Texas fame, was born in Tennessee on January 17, 1811. The Houston family moved to Lauderdale County, Alabama in 1821. George was educated at the Lauderdale County Academy and attended law school in Kentucky. He returned to Alabama in 1831 and was admitted to the bar at age 20. He was elected to the state legislature in 1832 and served as district solicitor in Limestone County from 1837 to 1841.

In 1841, at the age of 30, Houston was elected to the first of nine terms in the United States Congress. In 1849, after serving four terms, he ran for the United States Senate, but lost. He returned to his house seat in 1851 for five more terms. In 1861, Houston, together with the other Alabama congressmen, resigned from the House of Representatives upon the outbreak of the Civil War. He drafted the Alabama delegation's withdrawal statement to the Speaker of the House.

Throughout his political career, Houston was a study in contrasts. He opposed secession and the doctrine of nullification. Still, once Alabama seceded, he resigned from Congress. After resigning from Congress, he refused to fight in the Confederate Army. But, he also refused to take an oath of allegiance to the United States. His support

of the Confederate government cost him a seat in the United States Senate in 1865 when Congress refused to recognize his election. He remained popular in Alabama and was elected governor in 1874 and re-elected in 1876. Finally, in 1878, he was elected to the Senate again and this time served until his death on December 31, 1879.

Houston is remembered as a conservative governor who ended the Reconstruction era in Alabama. Among the highlights of his terms in office were the Alabama Constitutional Convention of 1875, the reorganization of the public school system, the establishment of the Alabama State Board of Health, and the creation of the state's 66th county, Cullman County, in 1877. Twenty-six years later, the state's 67th county was created and named in his honor.

The historical roots of Houston County are found in the history of Henry County. In the 1820s, Columbia, a river town in present-day Houston County, became the county seat of Henry. The date that Columbia was established is uncertain. However, the Indians moved away from the area before 1820. E. M. Attaway built the first store at the location and is credited with being the founder of the town. Columbia was an important crossroads for overland travel. It was also located on the Chattahoochee River making it accessible by water as well.

Columbia served as county seat of Henry County until 1832 when the courthouse was temporarily moved to Abbeville, which was named the permanent county seat town in 1833. Because of its location, Columbia continued to prosper as a center of trade and transportation. A college was established there in the 1830s, and it continued to be the largest town in the county through the census of 1890.

The residents of southern Henry County tried for more than 40 years to have the county seat and courthouse returned to a location convenient to them. Efforts were made to remove the courthouse from Abbeville in 1845, 1860 and 1879. Each time the election results favored Abbeville.

Finally, in 1885, the citizens of Henry County voted to hold the second week of terms of the Circuit Court in the southern part of the county. Columbia was chosen as the site. The citizens of Columbia provided a building for use as a courthouse, a two-story brick structure that had a wooden bell tower on its roof. The building served as a branch courthouse until Houston County was created and Dothan became its county seat. The structure continued its public service by being used as Columbia's schoolhouse for many years. The building was later abandoned as a school and was burned in a fire.

Aerial photo of Houston County Courthouse furnished by author Wendell Stepp—circa 1940s

The area that would become the city of Dothan was known to the Indians as a campground and resting place, both isolated and pleasant. It was heavily wooded with poplar and pine trees and had a large spring flowing out. Early pioneers found the spot as they traveled the trail from Columbia on the Chattahoochee River in the east to the Choctawhatchee region in the west. Other travelers journeyed through the site on their way from Eufaula in the north to Marianna, Florida in the south. The intersection of the two pathways near the spring became known as Poplar Head, located about 30 miles south of Abbeville.

By 1858, nine families called Poplar Head home. They petitioned the federal government in Washington for a post office. Official records showed that Alabama already had a Poplar Head listed in another county and so the post office at Poplar Head in Henry County was assigned the name Dothgn.

Very little growth took place in the community during the Civil War. However, in the Reconstruction period, lumbering and sawmill operations brought in new people, and settlers came into the area to farm the cleared lands. By 1880, a number of new citizens, including the Folkes and Baxley families, which included the grandfather and great-grandfather of Alabama State Bar President Wade Baxley, and former Attorney General and Lieutenant Governor Bill Baxley, moved to Poplar Head from the Rocky Branch community in Henry County.

By 1885 the population had grown enough for the town to be incorporated. On November 10, 1885, 20 citizens of Poplar Head unanimously voted to incorporate their town and chose the name of the post office as their official and legal town name. Some historical accounts state that the name was given to the town by the Reverend J. Z. S. Connelly, who took the name for the place from Genesis 37:17 which reads, 'For I heard them say, let us go to Dothan.' Biblical Dothan was a town and a plain located on the main caravan route from

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ALABAMA STATE BAR

To Serve the Profession

This photo appeared in The Alabama Lawyer, *Oct. 1978*

This photo appeared in The Alabama Lawyer, *Oct. 1978—Photo taken in the 1970s*

Damascus to Egypt. While this interesting story concerning the naming of the town has been retold in several historical accounts, it should be remembered that the former Poplar Head had been called Dothen for many years.

The correct spelling of the town name was the subject of some debate. An article appeared in the *Dothan Light* on April 3, 1889, under the headline 'How to Spell It.' The story read in part: "Our booming little town is spelled by some D-o-t-h-e-n, and by others D-o-t-h-a-n. Now which is correct has been the object of much dispute. The post office department spells it 'en' at Washington. We find it 'an' in the Bible, and we think it the oldest and best authority, hence we spell it D-o-t-h-a-n."

The previously mentioned Reverend Connelly became the first mayor of Dothan in 1885. He was followed by R. D. Carroll. In 1886, William J. Baxley, grandfather of Wade and Bill Baxley, became mayor and he served until 1887. Baxley was a blacksmith who later became a lawyer and then a justice of the peace, serving until 1923.

Dothan was rapidly becoming the principal commercial and population center of the "Wiregrass" region. This growth was sparked by the arrival of the Alabama Midland Railway in 1889. Dothan soon became a railroad hub positioned at the junction of the Atlantic Coastline Railroad, successor of Alabama Midland, the Central of Georgia Railway, and the Atlanta & St. Andrews Bay Railway.

This latter railroad has an interesting story as a short line railway extending from Dothan to the Gulf of Mexico. The town of Harrison, Florida on St. Andrews Bay wanted to rival Tampa as a banana port and freight terminal for cargo transported through the Panama Canal. The short line was to be used to get the freight to the larger lines at Dothan. To emphasize its goal, the town of Harrison formally changed its name to Panama City. Unfortunately, the railroads at Tampa reduced their freight rates, leaving the banana port at Panama City noncompetitive. Nevertheless, Dothan continued to have passenger rail service to the coast until 1956. And a large measure of the growth and development of both Dothan and Panama City can be attributed to the railroad affectionately called "The Bay Line."

On December 12, 1894, the Alabama Legislature approved a second branch courthouse for Henry County at Dothan. The citizens of Dothan provided a building at no cost to Henry County and from 1895 to 1903 Henry County had three courthouses located at Abbeville, Columbia and Dothan.

The population of Dothan was growing dramatically during these years, rising from 247 in 1890 to 3,275 in 1900 to 7,016 in 1910. When the Constitutional Convention of 1901 was organized, two Dothan delegates, T. M. Espy, a lawyer, and George H. Malone, a banker, proposed the creation of a new county which would have Dothan as its principal city. Thereafter, as mentioned before, Section 39 of the Constitution of 1901 was adopted, providing that a county with less than the previously mandated minimum area could be formed out of the counties of Henry, Dale and Geneva. Without this dispensation in the Constitution, it would have been impossible to shape a new county with the required minimum area.

In January 1903, Espy, who was Henry County's representative in the state legislature, introduced a bill to create a new county out of Henry, Dale and Geneva counties. He proposed to call the new county "Liberty" County. His bill was reported favorably out of committee. In order to gain maximum support he stated that members of the House could propose other names for the new county if they chose to do so.

Houston County Courthouse

Representative McDonald of Barbour County offered an amendment to change the name "Liberty" to "Semmes" to honor Admiral Raphael Semmes, a naval hero and commander of the Confederate raider "Alabama." Representative Fulton of DeKalb County offered another amendment and proposed the name of "Rodes" in honor of Robert E. Rodes, a Confederate general from Alabama who was killed at the Battle of Winchester, Virginia. Finally, Representative Robert Tyler Goodwyn of Montgomery suggested the name "Houston" to honor Reconstruction-era Governor George S. Houston who died in 1879 while serving Alabama as United States Senator. Goodwyn's amended bill passed the House by a vote of 52 to 26. On February 9, 1903, Governor William Dorsey Jelks signed the law creating Houston County.

On February 20, 1903, Governor Jelks appointed the first officers of the new county. The next day the legislature named George H. Malone of Dothan, C. C. Dalton of Wicksburg and H. P. Calhoun of Cottonwood as a commission to call an election to determine the location of the county courthouse. This election took place on March 16, 1903. Dothan received 1,986 votes and Ashford received 437 votes. Dothan officially became the new county seat.

The legislature placed Columbia within the boundaries of the new county. Columbia had been a former county seat of Henry County and still had a branch courthouse. The legislature mandated that the first session of court in the new county would be a split session in the spring of 1903. Two weeks of circuit court would be held at Columbia and two weeks at Dothan. The two-week fall term of court and all terms thereafter would be held exclusively in Dothan. In April 1903, the branch courthouse at Columbia was sold for one dollar to the town of Columbia to be used for municipal purposes. The old county jail on Main Street in Columbia was restored in later years and turned into a museum.

The first courts for the new Houston County were held on the second floor of a two-story structure located at the corner of Foster and Main streets in Dothan. These were only temporary quarters until the voters adopted a bond issue of $60,000 to finance the building of a courthouse.

A contract was signed on November 10, 1904, with M. T. Lewman and Company of Louisville, Kentucky for the construction of a courthouse. The architect for the building was Andrew J. Bryan of New Orleans. What is significant about this collaboration is that the year before, this same architect and contractor completed the Monroe County Courthouse in Monroeville. The basic elements of the two structures are strikingly similar. Both had a front section topped by a massive dome. Both had oval-shaped middle sections with a two-story circular courtroom. And both had a rectangular third section in the rear of the building.

In an article on the courthouse which appeared in *The Dothan Eagle* in 1973, employees talked about the old structure. One secretary called the courthouse "a monstrosity" and described it as "the most ill-arranged thing you've ever seen." She stated that "there were little bits of space in there you couldn't use for anything." It was apparently "designed for looks rather than utility." Another employee recalled that the old courthouse was crowded and that problems were caused by the open windows and fans used during the summer.

Circuit Judge Keener Baxley, who had served as both circuit solicitor (district attorney) and circuit judge, recalled that the county had to pay a clock keeper to wind the mechanism on the courthouse dome clock before it was replaced with electrical equipment. He stated that sometimes the four clock faces showed four different times. He recalled the circular balcony surrounding the high-ceilinged circular courtroom. And in summer, he noted, the courtroom was noisy because the windows were opened and the sounds of traffic came inside. In winter, the courtroom was heated by a coal-burning stove and a janitor would often have to come in during a trial to shovel in more coal.

This courthouse, which was completed in the fall of 1905, cost $46,000. In 1938, the county added an annex for offices and a jail under the Federal Emergency Administration of Public Works. Ogletree Construction Company was the builder and Charles H. McCauley was the architect. The cost of the 1938 annex was $100,000.

By the late 1950s it became apparent that the county needed a new courthouse. A grand jury report dated September 11, 1957 cited many needs

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Samuel A. Rumore, Jr. is a graduate of the University of Notre Dame and the University of Alabama School of Law. He served as founding chairperson of the Alabama State Bar's Family Law Section and is in practice in Birmingham with the firm of Miglionico & Rumore. Rumore served as the bar commissioner for the 10th Circuit, place number four, and is a member of *The Alabama Lawyer* Editorial Board. He is a retired colonel in the United States Army Reserve JAG Corps.

for the county, "a majority of which are impossible to provide in the present building." On October 27, 1958, another grand jury recommended immediate steps to build a modern courthouse on the same site. And the grand jury report of February 24, 1959 stated: "The courthouse as a whole is generally in bad condition and not adequate for the records and equipment needed to carry on the business of the county." Finally, the grand jury report of August 31, 1959 complained of "instances really too numerous to list in which our records, money, lives, and future security could be endangered." It cited the present courthouse as "dangerous, unclean, uncomfortable, and impossible of improvement in any reasonable manner."

In 1960, county offices were moved to the former Sears store which later became the Rhodes Furniture store and is now a law office building located across the street from the courthouse. The old courthouse was torn down and a modern structure was built on the same site. Construction took 27 months and the new courthouse was occupied in April 1962. The architect was Joseph L. Donfro & Associates of Dothan and the general contractor was W. K. Upchurch Construction Company of Montgomery. The cost was approximately $850,000.

The new courthouse is of modern design, four stories in height, and is constructed of reinforced concrete and masonry. A solid wall on the west facade was designed to eliminate the afternoon sun and the resulting heat from entering the building. An aluminum solar screen, designed to help reduce air-conditioning loads, protects the glass on the northern and southern sides of the building. The courthouse employees moved into this latest Houston County Courthouse on Confederate Memorial Day 1962. ■

The author acknowledges the assistance of Dothan attorneys Wade Baxley and Dan Whitehead, the Houston County Commission, author Wendell Stepp, and the Dothan Landmarks Foundation for assistance in obtaining material used in this article.

SOURCES: *History of Henry County, Alabama*, Eva Clyde (Stovall) Scott, 1961; *Hub of the Wiregrass-A History of Houston County, Alabama*, Fred S. Watson, 1972; *Henry, The Mother County 1816-1903*, Hoyt M. Warren, 1976; *Dothan, A Pictorial History*, Wendell H. and Pamela A. Stepp, 1984; "Wiregrass Sagas," Oscar L. Thompkins, *The Alabama Lawyer*, volume 3, pages 249-276, July 1942; "Houston County Courthouses," T. E. Buntin, Jr., *The Alabama Lawyer*, volume 39, pages 582-583, October 1978; *Alabama Magazine*, August 9, 1937; *The Dothan Eagle*, Tuesday, October 27, 1953; Article, *The Dothan Eagle*, April, 1973, by Jack Budd; *Constitution of Alabama of 1901*, Article II, Section 3

Side and rear views of Houston County Courthouse

LEGISLATIVE WRAP-UP

By Robert L. McCurley, Jr.

In addition to the Judges' Pay Raise Bill, the three Tort Reform Bills, and the Uniform Child Custody Jurisdiction and Enforcement Act that were mentioned in the July 1999 *Alabama Lawyer*, the following bills were enacted into law:

House Bill 7 (Act 99-397)-Amends Alabama Code Title 32 Chapter 5B, which requires the use of seat belts, now permits law enforcement officers to stop vehicles to enforce the wearing of seat belts.

House Bill 13 (Act 99-321)-A constitutional amendment that abolishes Alabama Constitution Section 102, which prohibits interracial marriages.

House Bill 25 (Act 99-436)-Allows grandparents to petition the court for visitation rights when the child is living with both biological parents who prohibit a relationship between the grandparent and the grandchild. The statute does provide for the appointment of a guardian ad litem for the child.

House Bill 26 (Act 99-447)-Amends the Protection of Abuse Act to provide a minimum of 30 days in jail for a second offense and 120 days in jail for third and subsequent offenses of abuse.

House Bill 61 (Act 99-403)-Alabama Code §13A-5-49 is amended to add to the list of aggravating circumstances which impose the death penalty to include the murder of two or more individuals in one act or series of intentional killings.

House Bill 123 (Act 99-437)-When a child is removed from the home and is in the care of DHR, the department must attempt to place the child with a relative. The relative may receive full foster care benefits.

House Bill 144 (Act 99-449)-Allows the Secretary of State to appoint international civil law notaries. To become an international civil law notary a person must have been admitted to practice law in Alabama for at least five years.

House Bill 260 (Act 99-582)-Requires state agencies to pay moving costs, relocation expenses and certain other costs to persons who own or reside in a dwelling on real property that is acquired by eminent domain.

House Bill 332 (Act 99-401)-Provides that a state agency must notify an employee within ten days of any detrimental information placed in the state employee's personnel file.

House Bill 333 (Act 99-432)-Amends Alabama Code §32-5A-199 to provide that a person over 21 years of age, who is convicted of DUI when a child under the age of 14 years of age was present in a vehicle at the time of the offense, will receive a sentence double the minimum punishment.

House Bill 383 (Act 99-314)-Amends Alabama Code §40-18-160 to clarify that the definition of Sub-chapter S Corporations conforms to federal income tax law definitions.

House Bill 425 (Act 99-572)-The Community Notification Act provides for notification of the release of a sexual offender to the neighbors around the new residence of the sexual offender. This law has been rewritten and the old law repealed.

House Bill 455 (Act 99-390)-Provides for the distribution of funds received under the tobacco tax. It also provides that the Governor of the State of Alabama will initiate and settle lawsuits involving the State of Alabama. Further, the Governor will appoint all attorneys who represent the state, except those who are employed in the Attorney General's Office.

House Bill 480 (Act 99-598)-Amends §32-5A-301 to §32-5A-308 to give specific guidelines to the proceedings for suspension or revocation of drivers licenses as well as to provide a period for administrative review for a person notified of an intended license suspension. There is further a right to judicial determination following the administrative hearing.

House Bill 491 (Act 99-433)-Provides that juvenile arrest and conviction records, fingerprints, photographs, DNA, etc. can be released to law enforcement agencies, victims and schools. This amends §12-15-100 et al.

House Bill 637 (Act 99-440)-Amends Alabama Code §30-3-170, 193 and 194 to provide that hunting and fishing licenses will be suspended or revoked for nonpayment of child support.

House Bill 708 (Act 99-589)-Amends the domestic violence shelter law in Alabama Code §33-6-1 et al. Marriage license fees are increased by $15 to fund domestic abuse centers, and the definition of abuse is expanded and provides for privileged communications between the abused and counselors.

Senate Bill 127 (Act 99-368)-Amends Alabama Code §40-7-2.1 to provide that a tax assessor can take an application for a homestead exemption from an attorney for the person claiming the exemption.

Senate Bill 270 (Act 99-371)-Provides that in the event computers or computer software malfunction due to the processing dates and times of Y2K, there is limited immunity from civil liability granted to the state, county, or municipality, including their independent contractors.

Senate Bill 393 (Act 99-435)-Amends Alabama Code §26-10A-2 et al. Provides for the father's implied consent for an adoption if the father fails to provide pre-birth financial or emotional support for six months before birth.

Correction: The minimum salary for a district judge beginning October 1, 2000 will be $99,526.

For more information concerning the Institute or any of its projects, contact Bob McCurley, director, Alabama Law Institute, P.O. Box 861425, Tuscaloosa, 35486-0013; phone (205) 348-7411; fax (205) 348-8411; or through the Institute's home page, www.law.ua.edu/ali. ■

Robert L. McCurley, Jr.
Robert L. McCurley, Jr. is the director of the Alabama Law Institute at the University of Alabama. He received his undergraduate and law degrees from the University.

Alabama Mediation and Arbitration Training

(Approved for CLE credit and Alabama Center for Dispute Resolution roster registration)

In-State *(Additional courses will be scheduled.)*

Sept. 27-29, **Birmingham**, *Mediation Training*, Resolution Resources Corp. (404) 215-9800. CLE 20 hours. Currently being reviewed for CLE credit.

October 7-9, **Birmingham**, *Mediation Process & the Skills of Conflict Resolution*, Litigation Alternatives, Inc. (Troy Smith), (800) ADR-FIRM or (888) ADRCLE3. CLE 20 hours.

October 14,15,18, **Mobile**, *General Mediation Training*, ADRI, Inc. (Joe Davenport) (770) 395-9992. CLE 20 hours.

October 21-25, **Mobile**, *Divorce Mediation*, Atlanta Divorce Mediators (Elizabeth Manley) (800) 862-1425. CLE 40 hours.

October 27-29, **Huntsville**, *Mediation/Conflict Management*, Better Business Bureau (Anne Isbell) (256) 539-2118. CLE 20 hours.

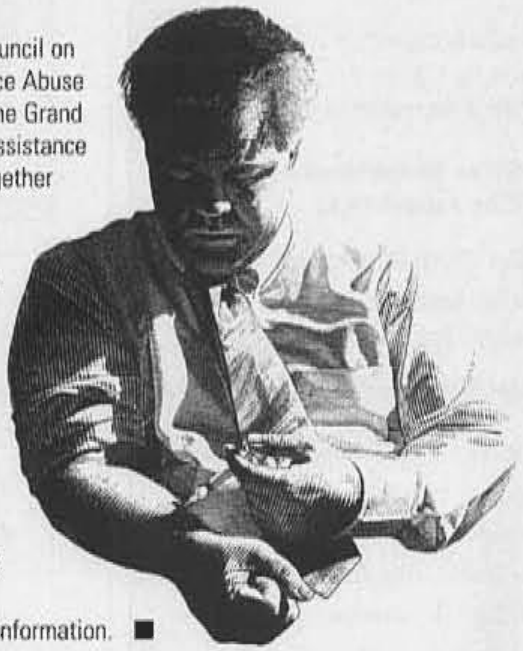
Note: To date, all courses except those noted have been approved by the Center. Please check the Interim Mediator Standards and Registration Procedures to make sure course hours listed will satisfy the registration requirements. For additional out-of-state training, including courses in Atlanta, Georgia, call the Alabama Center for Dispute Resolution at (334) 269-0409.

CLE Opportunities

The Alabama Mandatory CLE Commission continually evaluates and approves in-state, as well as nationwide, programs which are maintained in a computer database. All are identified by sponsor, location, date and specialty area. For a complete listing of current CLE opportunities or a calendar, contact the MCLE Commission office at (334) 269-1515, extension 117 or 158, or you may view a complete listing of current programs at the state bar's Web site, *www.alabar.org*.

Substance Abuse Statewide Symposium for the Legal Profession and Law Enforcement

On October 1 and 2, the Alabama State Bar will join the Montgomery-based Council on Substance Abuse-NCADD (COSA-NCADD) to present the first annual Substance Abuse Symposium for the Legal Profession and Law Enforcement. It will be held at the Grand Hotel in Point Clear. Jeanne Marie Leslie, program director of the Alabama Lawyer Assistance Program, serves on the symposium advisory committee. The symposium will bring together nationally known speakers to address important issues such as: Economic Effects of Substance Abuse on Society, An Overview of Addiction, Intervention: The First Step, Treatment: What Works, Resources for Assistance, Co-Dependency, Ethics: Addiction and Legal Issues, and Draeger: Alcotest 7710MK III.



Michael Moore, attorney general of the State of Mississippi, has agreed to be the dinner's keynote speaker, and guests may accompany conference participants for the dinner at a nominal additional cost.

Other sponsors of the event are: Alabama's Administrative Office of Courts, Judicial College, District Attorneys Association, Defense Lawyers Association, Trial Lawyers Association, Lawyers Association, Sheriffs' Association, Association of Chiefs of Police, State Troopers' Association, Peace Officers' Association, Criminal Defense Lawyers Association, Beverage Control Enforcement Division, Department of Public Safety, and Bureau of Investigation.

Phone Alice Murphy, COSA-NCADD executive director, at (334) 262-4526 for more information. ■

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ALABAMA STATE BAR

Volunteer Lawyers Program Leadership Councils

The Volunteer Lawyers Program and the Committee on Access to Legal Services of the Alabama State Bar recently recognized and thanked the VLP's Leadership Councils. The councils are two groups of attorneys, one in Birmingham and one in Montgomery, who have assisted in the forming of pro bono committees and volunteers in the large firms in the state.

This year's council members include Allison L. Alford; Julia A. Beasley; Robert C. Black, Jr.; Mitchell H. Boles; Carla R. Cole; Charles B. Haigler; James D. Hamlett; D. Mitchell Henry; Shawn Junkins; Hugh C. Nickson, III; Karen Sampson; Launice P. Sills; C. Clay Torbert, III; Judy B. Van Heest; and Patrick L. Sefton, all of Montgomery.

Birmingham council members are Robert E. Battle; Donna K. Byrd; Scott Clark; Paul J. DeMarco; Tammy L. Dobbs; Helen K. Downs; Michael D. Emert; James F. Hughey, III; Jane G. Hall; Ann W. Jones; Frances E. King; Robert M. Lichenstein, Jr.; Kimberly T. Lisenby; Candis A. McGowan; Alane A. Phillips; Scott Salter; Stephen W. Shaw; Victoria Franklin-Sisson; Lauren E. Wagner; and Carrie P. Walthall. ■

LETTER TO THE EDITOR

June 8, 1999

I recently returned from a seven-month tour of active military duty with a detachment from my Alabama Army National Guard unit. Five of those months were spent in Kuwait performing missions as part of Operations Southern Watch and Desert Fox. The detachment was activated very quickly last fall, with a minimum of notice and time to prepare.

I take this opportunity to thank the members and staffs of the Limestone County Bar Association, the judges of Limestone County, the Limestone County Courthouse personnel and the Alabama Court of Criminal Appeals and their staff for their cooperation and support during the hectic days leading up to the deployment. I watched the activities of the Alabama bench and bar closely during Operations Desert Shield and Desert Storm and was extremely proud of them. I can now gratefully, and with the certainty of experience, report that the people who are our profession are as ready and willing to do whatever is required to support their reserve component members today as they were then. They help make it happen.

Thank you.

Sincerely,
Frank B. Angarola
Athens, Alabama

It is hereby ordered that Rule 7, Alabama Rules of Disciplinary Procedure, be, and it hereby is, amended to add subsection (d), which shall read as follows:

"(d) Terms of Members of Local Grievance Committees. Members appointed to serve on a local grievance committee shall be appointed for the following terms: one-third of the initial members shall be appointed for one year; one-third of the initial members shall be appointed for two years; and one-third of the initial members shall be appointed for three years. Subsequent appointments shall be for terms of three (3) years. No member who has served three full three-year terms shall be eligible for reappointment to the committee within two (2) years after the end of that member's most recent term. Any member appointed to serve on a local grievance committee, shall, before serving on the committee, attend a training session conducted by the Office of General Counsel of the Alabama State Bar."

It is further ordered that the following comment be added to Rule 7: "Court Comment to Amendment Effective September 1, 1999."

"The amendment to Rule 7, effective September 1, 1999, added subsection (d), providing for terms of members of local grievance committees."

It is further ordered that the following note from the reporter of decisions to be added to follow Rule 7:

"Note from the reporter of decisions: The order amending Rule 7, effective September 1, 1999, is published in that volume of *Alabama Reporter* that contains Alabama cases from So. 2d."

It is further ordered that this amendment and the adoption of the comment be effective September 1, 1999.

Hooper, C.J., and Maddox, Houston, Cook, See, Lyons, Brown, and Johnstone, JJ., concur.

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ARBITRATION: Post-Award Procedures

By William H. Hardie

Introduction

It is assumed that a valid written agreement to arbitrate existed in a transaction involving interstate commerce so that the Federal Arbitration Act ("FAA") applies. It is also necessarily assumed that there has been a completed arbitration award. There are two circumstances under which the parties to an arbitration may wish to resort to the courts. First, a party unsatisfied with the result may petition the court to vacate the award, and second, the successful party may petition the court to enforce the award against a party who has refused to comply with the award. In the latter case, the party resisting compliance may respond with a motion to vacate the award.

Enforcement of an Arbitration Award

A. Jurisdiction

(1) Federal courts

Although Section 9 of the FAA appears to grant subject matter jurisdiction to federal courts for arbitration cases, dicta in *Moses H. Cohen Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983), says otherwise. Consequently, federal courts have uniformly held that neither the FAA as a whole, nor Section 9 by itself, confers subject matter jurisdiction on a federal court. *See TM Marketing, Inc. v. Art & Antiques Associates, L.P.*, 803 F.Supp. 994, 997-998 (D.N.J. 1992) (listing cases). If other bases for federal jurisdiction, such as federal question or diversity jurisdiction, exist, then Section 9 of the FAA authorizes an action in federal court to confirm an arbitration award. The district in which the award was made is the exclusive venue for such an action. *Bill Harbert Construction Co. v. Cortez Byrd Chips, Inc.*, 1999 WL 1223719 (11th Cir. 1999).

(2) Alabama courts

For many years the Alabama Code has included a provision barring enforcement of pre-dispute arbitration agreements: "The following obligations cannot be specifically performed: . . . (3) An agreement to submit a controversy to arbitration;." Section 8-1-41, Ala. Code (Michie 1993). The FAA now preempts this law for agreements involving interstate commerce. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Old Republic Insurance Co. v. Lanier*, 644 So. 2d 1258, 1260 (Ala. 1994).

The FAA preemption is not express, and the Supreme Court of the United States has held that the FAA does not reflect a congressional intent to occupy the entire field of arbitration. *Volt Information Sciences, Inc. v. Leland Stanford, Jr. Univ.*, 489 U.S. 468, 477 (1989). Therefore, there is no federal policy favoring arbitration under a certain set of procedural rules. *Id.* at 476. Consequently, if the agreement to arbitrate also incorporates a choice of law clause, the arbitration procedures of the state selected in that clause may apply even if the procedures differ from the FAA. *Id.* at 479.

Alabama has not developed rules for dealing with pre-dispute agreements independent from the FAA, so the Supreme Court of Alabama has stated that it would follow

9 U.S.C. Sections 3 and 4 in connection with the initiation of arbitration based on a pre-dispute agreement. *Allied-Bruce Terminix Cos. v. Dobson*, 684 So. 2d 102, 106 (Ala. 1995), *on remand from* 531 U.S. 265 (1995). The court has also relied on the FAA for provisions authorizing an appeal from the denial of a motion to compel arbitration. *Id.* at 104 n. 1. The Alabama court has further stated that when an arbitration contract evidences a transaction involving interstate commerce, "the policies and provisions of the FAA govern all questions of the validity, interpretation, construction, and enforceability of the arbitration agreement." *Blount International, Ltd. v. James River-Pennington, Inc.*, 618 So. 2d 1344, 1345 (Ala. 1993); *Old Republic Insurance Co. v. Lanier*, 644 So. 2d 1258, 1260 (Ala. 1994).

Although the Alabama Code has prohibited enforcement of *pre-dispute* agreements to arbitrate, such an agreement is enforceable if it is made after the dispute arose. Therefore, since 1852 the Alabama Code has included its own procedures for enforcing arbitration awards. *See* Section 6-6-1 through Section 6-6-16, Ala. Code (Michie 1993). This leaves open the question, discussed further in connection with the vacatur of awards, of whether Alabama or FAA procedures apply to post-award petitions to confirm an award.

B. Authority

Section 9 of the FAA states that the award may be entered by the court "if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award. . . ." This conditional statement has raised questions in federal courts whether a judgment based on an arbitration award can be entered in the absence of a specific agreement for entry of such a judgment by the parties. The issue has not been conclusively resolved. Most courts have held that an explicit agreement between the parties providing for judicial confirmation of an award is not an absolute prerequisite to Section 9 authority to enter judgment on the award, especially if the agreement states that the award of the arbitrator shall be "final and binding." *See Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 930 (11th Cir. 1990); *Teamsters-Employer Local No. 945 Pension Fund v. Acme Sanitation Corp*, 963 F.Supp. 340, 346 (D.N.J 1997).

This question is instructive to persons drafting arbitration agreements. The form recommended by the American Arbitration Association uses "final and binding" language and contains an explicit agreement between the parties for judicial confirmation.

The Alabama arbitration act states that an award made substantially in compliance with the act is "conclusive" between the parties. Section 6-6-14. Moreover, the procedure for confirmation in circuit court does not contain conditional language comparable to the FAA.

C. Timing

Section 9 of the FAA provides that an action to confirm an arbitration award must be brought within one year of the award. If it is not commenced within one year, then the action to confirm is time barred in federal court.

The Alabama arbitration act does not provide for a specific period of limitations on commencing an action to confirm an arbitration award.

Alabama's six-year limitations period for contracts and specialties might be applicable. Section 6-2-34, Ala. Code (Michie 1993). One federal court, applying the District of Columbia Arbitration Act, utilized the District of Columbia's general

It is ordered that the Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations be amended to add Rule 9, "Professionalism," which shall read as follows:

Rule 9. Professionalism

A. "Within twelve (12) months of being admitted to the Bar, or within twelve (12) months of being licensed to practice law in Alabama, whichever shall last occur, each lawyer shall complete a six-(6) hour course in professionalism.

B. "The Alabama State Bar shall provide the materials and instruction for the course in professionalism, which shall be offered at least four times each year.

C. "The charge made for the course shall not be more than the actual direct costs of conducting the course, including securing and reproducing printed materials, paying the instructors, and paying for the meeting room.

D. "The sanctions for violating Rule 9 are contained in Rule 6.B."

It is further ordered that the following note from the reporter of decisions be added to follow Rule 9:

"Note from the reporter of decisions: The order adopting Rule 9, effective September 1, 1999, is published in that volume of the *Alabama Reporter* that contains cases from So.2d."

It is further ordered that this adoption of Rule 9 be effective September 1, 1999.

Hooper, C.J., and Maddox, Houston, Cook, See, Lyons, Brown, and Johnstone, JJ., concur.

limitations period. *In re Consolidated Rail Corp.*, 867 F.Supp. 25, 32 (D.D.C. 1994).

One reason to obtain judicial confirmation, even after a long delay, would be to eliminate any question about the *res judicata* effect of an unconfirmed award. *See, e.g., Jacobson v. Fireman's Fund Insurance Co.*, 111 F.3d 261, 266-268 (2d Cir. 1997); *Stulberg v. Intermedics Orthopedics, Inc.*, 997 F.Supp. 1060, 1068 (N.D. Ill. 1998); *JSC Securities, Inc. v. Gebbia*, 4 F.Supp. 2d 243, 250-251 (S.D.N.Y. 1998); *Huntsville Golf Development, Inc. v. Aetna Casualty & Surety Co.*, 632 So. 2d 459, 461 (Ala. 1994).

D. Procedure

(1) The FAA

The FAA contemplates that any "party to the arbitration may apply to the court" for an order confirming the award. The court must grant such an order unless the award is vacated, modified, or corrected as prescribed in the FAA. 9 U.S.C. Section 9.

A party initiates proceedings to confirm an award by filing either a petition or motion to confirm the award, not by filing a complaint. *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990). The document that commences such a procedure should be called "petition for confirmation of arbitration award" instead of a complaint. The petition must include the application for the order confirming the award together with the arbitration agreement, the appointment of the arbitrator, the award itself and any other papers connected with the application to confirm. 9 U.S.C. Section 13.

Notice must be served on the adverse party. The "notice" to the adverse party is simply a copy of the petition, not a summons. There is no compulsion on the adverse party to file an answer unless he or she seeks to set aside the award. 9 U.S.C. Section 9.

(2) State law

The statutory procedure for reviewing an arbitration award appears in the Alabama arbitration act. If an action is already pending, the successful party simply files the award and other papers with the court. If no action is pending the successful party files the submission and award with the clerk of the circuit court of the county in which the award is made. According to the statute such an award has the force and effect of a judgment upon which execution may issue as in other cases. Section 6-6-12, Ala. Code (Michie 1993).

For the successful party in an arbitration, there are no particular pitfalls. As we shall see, it is the unsuccessful party who must move quickly to avoid the traps in both the FAA and state law procedures.

Vacating an Arbitration Award

A. Jurisdiction

As with the enforcement of an arbitration award, the procedures of the FAA are available in federal court only upon establishment of independent federal jurisdiction. *See Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1247 (D.C. Cir. 1999) (questioning whether federal courts have jurisdiction even when the underlying dispute arose under federal law). Moreover, as with the enforcement, the FAA does not preempt state procedures.

Frequently, an arbitration agreement will contain language that the arbitrator's award is "final," "binding," and "non-appealable." Such language does not, however, bar review and vacatur for the grounds recognized under the Federal Arbitration Act. *See International Telepassport Corp. v. USFI, Inc.*, 89 F.3d 82, 86 (2d Cir. 1996); *M&C Corp. v. Erwin Behr GmbH & Co.*87 F.3d 844, 847 (6th Cir. 1996); *DDI Seamless Cylinder International, Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163, 1166 (7th Cir. 1994); *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992).

B. Procedure and timing

Under both the FAA and state law procedures, timing is all-important for the unsuccessful party seeking to vacate an arbitration award.

(1) Federal Arbitration Act

Under the FAA, notice of a motion to vacate, modify or correct an award in federal court must be served on the adverse party within three months after the award is filed or delivered. 9 U.S.C. Section 12.

Because the successful party has one year, the unsuccessful party may not simply refuse to comply with the award and await the successful party's action to confirm the award. Several courts have squarely held that the unsuccessful party's failure to move to vacate the award within the three-month time precludes him from later seeking that relief when a motion is made to confirm the award within one year but after the expiration of three months. *See, e.g., Cullen v. Paine, Webber, Jackson & Curtis, Inc.*, 863 F.2d 851, 853-854 (11th Cir. 1989), *cert. denied*, 490 U.S. 1107 (1989); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984).

(2) Alabama state court

In state court, the time within which to act is even shorter. Notice of the appeal must be filed within ten days after receipt of notice of the award.

The supreme court has stated that the only method for opposing the award under the Alabama arbitration act is an appeal within ten days after receipt of notice of the award, and that appeal is to the "appropriate appellate court, and not the trial court." *See Moss v. Upchurch*, 278 Ala. 615, 620, 179 So. 2d 741, 746 (1965) (the statutory procedures are the exclusive methods for review of an award). The cases, especially recent cases, are not consistent. *See Roscoe v. Jones*, 571 So. 2d 1043 (Ala. 1990) (no one questioned timing of defendant's motion to vacate nor did the parties follow appellate procedure of Section 6-6-15); *Wright v. Land Developers Construction Co.*, 554 So. 2d 1000 (Ala. 1989) (unsuccessful party did not file notice of appeal in accordance with Section 6-6-15, and no one objected); *H.L. Fuller Construction Co. v. Industrial Development Board*, 590 So. 2d 218, 221 (Ala. 1991) (supreme court remanded to comply with Section 6-6-15 and then applied FAA grounds for vacation of award).

No decision of the Supreme Court of Alabama has held that a litigant in the Alabama state courts can follow the FAA procedure or time limitation to vacate an arbitration award. In *H.L. Fuller Construction Co. v. Industrial Development Board*, 590 So. 2d 218 (Ala. 1991), the unsuccessful party filed a notice of appeal with the Supreme Court of Alabama which remanded the case to the circuit court for proceedings in

accordance with Section 6-6-15. *Id.* at 220-221. The unsuccessful party filed a motion to vacate which was denied and the supreme court then accepted the appeal.

In *Maxus, Inc. v. Sciacca*, 598 So. 2d 1376, 1379 (Ala. 1992), the parties apparently followed the FAA procedures in the circuit court of Shelby County to review the award, but the timing is not disclosed. The court stated:

> The broad issue before this Court, as framed by Maxus, concerns the standard of review and procedure a court in Alabama is to utilize in its review of an arbitration proceeding. In other words, once the parties have agreed to arbitrate a particular matter and one party is dissatisfied with the results, will this Court apply Alabama law or federal law to review the arbitration award?
>
> It is only the law to be applied in reviewing the arbitration award that is in dispute.
>
> Maxus contends that this transaction involved interstate commerce and that the Federal Arbitration Act, 9 U.S.C. Section 1 *et seq.* (FAA), applies. The Sciaccas argue that the FAA is not applicable and that the arbitration award may be reviewed only according to the Alabama Arbitration Statute. Therefore, in order to determine the applicable law to be applied in reviewing this arbitration award, we must determine whether the FAA applies.

(Footnote omitted).The court then reviewed the transaction and concluded that it did involve interstate commerce, so it held "that the FAA is applicable here." *Id.* The opinion does not reflect any appreciation of the distinction between the substantive duty to arbitrate imposed by the FAA and the procedural forms to be followed in reviewing the award. Instead, the court's analysis is Delphic, at best:

> Having held that the FAA is applicable to this case, we point out that its application is controlled by principles of "substantive federal law." *Ex parte Costa & Head*, at 1275. In cases governed by the FAA, the federal substantive law of arbitration governs, despite contrary state law or policy. *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *H.L. Fuller Construction Co. v. Industrial Development Board of the Town of Vincent*, 590 So. 2d 218 (Ala. 1991). Further, the provisions of the FAA govern all questions of the validity, interpretation, construction and enforceability of the arbitration agreement. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *Willoughby Roofing & Supply Co. v. Kajima International, Inc.*, 598 F.Supp. 353 (N.D. Ala. 1984), *affirmed*, 776 F.2d 269 (11th Cir. 1985).

Id. at 1379. The court then referred solely to the grounds contained in the FAA for vacating an arbitration award. *Id.* at 1380. It did not offer any insight on the correct procedural method for obtaining review. This may be read as an adoption of all FAA procedures for review of an arbitration award, but the differences in timing and appellate jurisdiction are so significant, that one could wish that the court had explained itself with more clarity.

In *Pruett v. Williams*, 623 So. 2d 1115, 1116 (Ala. 1993), the successful party filed a motion for summary judgment based on the arbitrator's award within three days after the issuance of the award. The unsuccessful party filed a cross-motion requesting the court to vacate the arbitration award and within the ten day period also filed an appeal of the arbitration award to the Supreme Court of Alabama pursuant to Section 6-6-15. The *Maxus* decision seems to have been forgotten, and no reference is made to the procedures outlined in the FAA.

A number of cases outside Alabama have held that state limitations can bar a motion to vacate even if it was timely under the FAA.

In *Ekstrom v. Value Health, Inc.*, 68 F.3d 1391, 1392 (D.C. Cir. 1995), the court found that Connecticut's shorter limitation on the time within which to file a petition to vacate was controlling because the agreement specified Connecticut law in a choice of law clause. The court held that the longer FAA period of limitation did not preempt the parties' agreement that Connecticut law would apply. *Id.* at 1395-1396.

In *New England Utilities v. Hydro-Quebec*, 10 F.Supp.2d 53, 60 (D. Mass. 1998), the court declined to apply a shorter Massachusetts period of limitation because the contract invoked the law of Quebec with a longer period of limitations in its arbitration law. Nevertheless, the court acknowledged that the FAA did not preempt shorter state law periods of limitation.

Therefore, in the absence of independent federal jurisdiction, the unsuccessful party in Alabama should file a notice of appeal in the circuit court within ten days pursuant to Section 6-6-15.

Moreover, even if there is federal jurisdiction, the action to vacate should be filed in federal court within ten days if the arbitration agreement invokes Alabama law in a choice of law clause.

The tension between the FAA and state law is far from resolved. For example, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54-55 (1995), the Supreme Court of the United States held that a contract subject to the FAA permitted an arbitrator to award punitive damages despite New York law that would prevent an arbitration award for punitive damages. This issue, however, is more substantive than procedural.

C. Grounds for vacating an arbitration award

Arbitrators are not required to make findings of fact or conclusions of law, nor are they required to disclose the facts or reasons behind their awards. *Bernhardt v. Polygraph Co. of America*, 350 U.S. 198, 204 n.4 (1956). Moreover, the arbitrator's award carries a presumption of correctness. *Davis v. Prudential Securities*, 59 F.3d 1186, 1190 (11th Cir. 1995); *Brown v. Rauschner Pierce Refsnes, Inc.*, 994 F.2d 775, 778 (11th Cir. 1993); *Robbins v. Day*, 954 F.2d 679, 682 (11th Cir. 1992), *cert. denied*, 506 U.S. 870 (1992). Therefore, the unsuccessful party faces a heavy burden in trying to overturn an arbitrator's award.

Both the FAA and the Alabama arbitration act contain specific grounds for denying confirmation of an arbitration award. All of the grounds contained in the Alabama arbitration act, Section 6-6-14, are also contained in the FAA, 28 U.S.C. Section 10. The FAA also includes additional grounds that do not appear in the Alabama act.

In addition, the courts seem to recognize extra-statutory grounds for vacating arbitration awards. *See Wilko v. Swan*, 346 U.S. 427, 436 (1953) (awards may be set aside for "manifest disregard of the law"); *Cole v. Burns Intern. Sec. Services*, 105 F.3d 1465, 1486 (D.C. Cir. 1999) (listing grounds for vacating award). Moreover, the arbitration agreement can set out additional grounds on which a court may review the arbitrators' award. *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995); *but see Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991) (parties cannot contract for judicial review of an award). *See generally* S. L. Hayford, "Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards," 30 Ga. L. Rev. 731 (1996).

Consequently, the following statutory and judicially-fashioned grounds for vacating arbitration awards appear to exist:

1. The arbitrator was guilty of fraud in making the award. Section 6-6-14.
2. The arbitrator was guilty of partiality in making the award. 9 U.S.C. Section 10(a)(2); Section 6-6-14.
3. The arbitrator was guilty of corruption in making the award. 9 U.S.C. Section 10(a)(2); Section 6-6-14.
4. The award was procured by corruption. 9 U.S.C. Section 10(a)(1).
5. The award was procured by fraud. 9 U.S.C. Section 10(a)(1).
6. The award was procured by undue means. 9 U.S.C. Section 10(a)(1).
7. The arbitrator was guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown. 9 U.S.C. Section 10(a)(3).
8. The arbitrator was guilty of misconduct in refusing to hear evidence pertinent and material to the controversy. 9 U.S.C. Section 10(a)(3).
9. The arbitrator was guilty of misbehavior by which prejudiced the rights of any party. 9 U.S.C. Section 10(a)(3).
10. The arbitrator exceeded his powers. 9 U.S.C. Section 10(a)(4).
11. The arbitrator so imperfectly executed his powers that a mutual final and definite award was not made. 9 U.S.C. Section 10(a)(4). *E.g., Maxus, Inc. v. Sciacca*, 598 So.2d 1376 (Ala. 1992).
12. The award violates fundamental public policy. *See Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775 (11th Cir. 1993); *Hackett v. Milbank, Tweed Hadley & McCoy*, 86 N.Y.2d 146, 630 N.Y.S.2d 274, 654 N.E.2d 95 (1995).
13. The arbitrator acted in manifest disregard of the law. *O.R. Securities, Inc. v. Professional Planning Assocs., Inc.*, 857 F.2d 742, 747 (11th Cir. 1988).
14. The arbitrator's award was arbitrary and capricious. *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410, 1412 (11th Cir. 1990).
15. The arbitrator's award was completely irrational. *See LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997).
16. The arbitrator's award fails to draw its essence from the parties' underlying contract. *See Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634-635 (10th Cir. 1988).

The cases interpreting these grounds are fact-specific, so the precedent is not always instructive. This leaves ample room for a creative lawyer to fit the facts into one of these grounds.

Arbitrator's fraud

This ground is found in the Alabama arbitration act. Section 6-6-14. In *Pruett v. Williams*, 623 So. 2d 1115, 1116 (Ala. 1993), the court rejected the unsuccessful party's claim that the arbitrator had committed fraud in his award by misrepresenting his expertise in the area of construction law. Otherwise, the Supreme Court of Alabama seems not to have given significant analysis to this ground. However, the *Pruett* case does give some idea of what might be raised under this ground. The phrase "fraud in making the award" suggests that there must be some causal relationship between the fraud and the award.

Partiality in making the award

This ground appears in both the federal and Alabama statutory law. Unfortunately, neither act provides any statutory guide to the meaning of the phrase "evident partiality." Instead, Justice Black's plurality opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968), is the beginning of the search for a definition. He suggested that "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign to decide the law as well as the facts and are not subject to appellate review." Thus, he concluded, arbitrators must avoid even the "appearance of bias." *Id.* at 150. This was not a majority opinion, however, and the concurring opinions make it clear that "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are aware of the facts that the relationship is trivial." *Id.* (White, J., concurring).

Most courts are reluctant to impose Justice Black's burden on arbitrators. Typical is the statement of the Second Circuit in *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173-174 (2d Cir. 1984): "The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator." *See Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (the father-son relationship between an arbitrator and the president of an international union whose local union was a party to the arbitration is "evident partiality"); *International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548 (2d

Cir.), *cert. denied*, 451 U.S. 1017 (1981) (the fact that an arbitrator was also a witness in another arbitration involving the same law firms representing the parties in the arbitration in question was not "evident partiality"); *Local 814, International Brotherhood of Teamsters v. J&B Systems Installers & Moving, Inc.*, 878 F.2d 38, 41 (2d Cir. 1989) (standard requires more than speculation that amounts to a claim that there is an appearance of bias); *Reeves Brothers, Inc. v. Capital-Mercury Shirt Corp.*, 962 F.Supp. 408, 414 (S.D.N.Y. 1997); *Mantle v. Upper Deck Co.*, 956 F.Supp. 719, 729 (N.D. Tex. 1997) (listing cases).

In *Lifecare International, Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995), the claim of partiality was based on contacts between one of the arbitrators and an attorney who was employed by the same law firm that represented the unsuccessful party to the arbitration. Some of these contacts were disclosed prior to the arbitration and rejected by the American Arbitration Association as grounds for disqualification but others were disclosed after the award. The district court's denial of the defendants' motion to vacate was affirmed by the Eleventh Circuit. The appellate court characterized these arguments as "remote, uncertain, and speculative partiality or a mere appearance of bias or partiality as opposed to bias or partiality that is direct, definite, and capable of demonstration." *Id.* at 434.

In order to vacate on the ground of evident partiality in such a non-disclosure case, the party challenging the arbitration award must establish that the undisclosed facts create a "reasonable impression of partiality." *Middlesex Mutual Insurance Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982).

In *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 148-149 (4th Cir. 1994), *cert. denied*, 130 L.Ed2d 786 (1995), the court discussed the claim that the arbitrator's conduct toward the party and the arbitrator's ex parte conduct with that party's counsel exhibited bias evidencing partiality. The party alleging bias must establish specific facts that create a reasonable impression of partiality. *See Arizona Electric Power Cooperative, Inc. v. Berkeley*, 59 F.3d 988, 993 (9th Cir. 1995).

Arbitrator's corruption

The term "corruption" is not defined in either the state or federal acts. The dictionary defines corruption as "impairment of integrity, virtue, or moral principle." *Webster's Ninth New Collegiate Dictionary* (1987). No cases have been found defining this term in the context of arbitration.

Award procured by corruption

This evidently refers to corruption by a party, witness or other person as well as the arbitrator. Certainly, it would include bribery or other improper conduct intended to influence the arbitrator, but it also might include bribery of witnesses or other parties.

Award procured by fraud

It seems clear that in order to justify vacating an award because of fraud, the parties seeking vacation must show that the fraud was materially related to the arbitration. *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1404 (9th Cir. 1992), *cert. denied*, 506 U.S. 1060 (1993). Moreover, the fraud must be established by "clear and convincing evidence." *Id.*; *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988).

Perjury has been asserted unsuccessfully as a ground of fraud on which to base the vacation of an arbitration award. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lambros*, 1 F.Supp. 2d 1337, 1345 (M.D. Fla. 1998).

Perjury, that is false testimony during the course of a trial, is not usually a fraud on the court such as to support an action to set aside a judgment. *See Hall v. Hall*, 587 So.2d 1198, 1200-1201 (Ala. 1991), quoting *Travelers Indemnity Co. v. Gore*, 761 F.2d 1549, 1552 (11th Cir. 1985). Therefore, mere perjury, alone, is probably not a sufficient "fraud" on which to base a motion to vacate an arbitration award. On the other hand, if the successful party encouraged false testimony, then it might qualify. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lambros*, 1 F.Supp. 2d at 1345.

Award procured by undue means

Again, "undue means" is not defined in the FAA. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lambros*, 1 F.Supp. 2d 1337, 1344 (M.D. Fla. 1998), the unsuccessful party included such alleged conduct as conspiring to secure the unavailability of witnesses, supporting perjury, redacting documents by falsely asserting privilege and procedural maneuvers designed to inhibit the presentation of the adverse party's case as "undue means."

In *Hott v. Mazzocco*, 916 F.Supp. 510, 517 (D. Md. 1996) (applying Maryland's arbitration act), the court accepted "contemplates some type of bad faith in the process" as the definition of "undue means." It also concluded that the same was true with respect to "misconduct" which must be "something patently egregious," such as an arbitrator sleeping during testimony or having ex parte contacts. *Id.* In *Dean Foods Co. v. United Steelworkers of America*, 911 F.Supp. 1116, 1124-1125 (N.D. Ind. 1995) (labor arbitration), the court stated:

> [T]he plaintiff who alleges that an arbitration award was procured through "undue means" must demonstrate that the conduct was (1) not discoverable by due diligence before or during the arbitration hearing; (2) materially related to an issue in the arbitration; and (3) established by clear and convincing evidence.

Further, the court explained that the term "undue means" connotes some type of "bad faith" in the procurement of the award. *Id.* The court rejected the suggestion that the term "undue means" should be interpreted to apply to the submission of evidence that is merely legally objectionable. *Id.*

Refusing to postpone the hearing

Under the FAA, a court may vacate an award where the arbitrators were guilty of "misconduct" in refusing to postpone the hearing, upon sufficient cause shown. This reference to postponement of the hearing is one of the most specific of the

grounds stated in the FAA. Therefore, in any case where an arbitrator has refused to postpone a hearing, there is potential for an application to vacate the award. However, the statutory provision requires interpretation of the term "misconduct" and evaluation of the "sufficient cause shown."

In *Grahams Service, Inc. v. Teamsters Local 975*, 700 F.2d 420, 422-423 (8th Cir. 1982), the court concluded that such a refusal would have to affect the rights of a party to the extent of depriving it of a fair hearing before it would apply this ground. It refused to vacate the award on this ground because it concluded that the arbitrator's refusal to postpone the hearing did not deprive the party of a fair hearing.

In *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1016 (11th Cir. 1998), the court discusses some of the cases refusing to apply this ground to vacate an arbitrator's award. The court expressly rejected the demands of ongoing litigation in another court as a valid excuse for delaying the hearing. *Id.* at 1016-1017. In *Marshall & Co. v. Duke*, 941 F.Supp. 1207, 1211-1212 (N.D. Ga. 1995), *aff'd*, 114 F.3d 188 (11th Cir. 1997), *cert. denied*, 140 L.Ed2d 108 (1998), the court refused to vacate an award based on the refusal to postpone where there had been numerous adjournments and the unsuccessful party repeatedly failed to meet obligations with respect to earlier hearings.

The decision in *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d Cir. 1997), is unique in that the court of appeals reversed the trial court and vacated the arbitrators' award on the sole ground that the arbitrators had refused to postpone the hearing in order to hear testimony from the former president of the unsuccessful party. The court stated that the applicable standard was whether the action of the arbitrators was "fundamentally unfair." *Id.* at 20.

Refusing to hear pertinent evidence

The courts do not seem to attribute any particular significance to the use of the term "pertinent" compared to, say, "relevant" or "material." In fact, "pertinent" seems to combine the concepts of relevance and materiality. *See Black's Law Dictionary* (6th Ed. 1990). It is also interesting that the FAA considers it a ground for vacatur to *refuse* to hear relevant evidence, but not a ground to *admit* irrelevant evidence. Evidently, this reflects a desire on the part of Congress that parties to arbitration should be given a full and fair opportunity to present all of their evidence.

In *Scott v. Prudential Securities, Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998), the court concluded that the arbitrators had not committed misconduct by refusing to allow one of the parties to participate in the arbitration by telephone because the evidence tendered was irrelevant. On the other hand, in *Gulf Coast Industrial Workers Union v. Exxon Company, USA*, 70 F.3d 847, 850 (5th Cir. 1995), the appellate court upheld the district court's decision to vacate the award. The arbitrator not only had refused to consider evidence of a positive drug test but he also prevented the employer from presenting additional evidence. Then the arbitrator used the lack of evidence as a predicate for ignoring the test results. The court observed that such misconduct "falls squarely" within the meaning of misconduct and refusing to hear evidence. In *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992), *cert. denied*, 506 U.S. 870 (1992), the court stated:

> A federal court may vacate an arbitrator's award under U.S.C. Section 10(a)(3) only if the arbitrator's refusal to hear pertinent and material evidence prejudices the right of the parties and denies them a fair hearing. Further, an arbitration award must not be set aside for the arbitrator's refusal to hear evidence that is cumulative of irrelevant.

The court affirmed the district court's confirmation of the award where the unsuccessful party's representation to the arbitrator and opposition to postponement created the circumstances under which the arbitrator was unable to hear the evidence.

In *Schmidt v. Finberg*, 942 F.2d 1571, 1575 (11th Cir. 1991), the court considered both a refusal to postpone and a refusal to hear evidence claim and rejected them, in part, on the ground that the unsuccessful parties seeking vacation of the award had made no offer of the testimony that the witness would have given if the hearing had been continued.

In *Pompano-Windy City Partners, Ltd. v. Bear Stearns & Co.*, 794 F.Supp. 1265, 1277-1278 (S.D.N.Y. 1992), the court concluded that even if the arbitrators had improperly excluded one witness's testimony, it was clear from the "wealth of evidence in the record" that the exclusion did not constitute a denial of "a fundamentally fair hearing" sufficient to justify vacatur of the award.

In *Prudential Securities, Inc. v. Dalton*, 929 F.Supp. 1411, 1415-1416 (N.D. Okla. 1996), the court defined a "fundamentally fair hearing":

> A fundamentally fair hearing requires the procedural steps of notice, an opportunity to be heard, the opportunity to present evidence which is relevant and material, and arbitrators who are not infected with bias.

In *Conlux USA Corp. v. Dixie-Narco, Inc.*, 929 F.Supp. 269, 274-275 (N.D. Ohio 1996), the unsuccessful party claimed that it had been denied a fundamentally fair hearing because the arbitrator refused to hear evidence after the award in response to the basis of the arbitrator's award. The court observed that the arbitrator had heard all the evidence proffered before making his ruling. The arbitrator was not required to hear newly discovered evidence, and such evidence could not be made the basis for vacating an arbitration award. Otherwise, "arbitration awards could never be final." *Id.*

Misbehavior that prejudices the rights of any party

This category is obviously a catch-all for wrongful arbitrator conduct that causes prejudice to one of the parties. It has been the basis for vacating an arbitration award where the arbitrators received ex parte information to the prejudice of one of the parties. *See Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 995 (3d Cir. 1997); *Mutual Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 55-56 (3d Cir. 1989).

In *Liebman v. Alphagraphics Franchising, Inc.*, 958 F.2d 377 (9th Cir. 1992) (unpublished) the unsuccessful party to arbitration complained that the arbitrators' rulings with regard to the use of counsel constituted misbehavior, but the court responded: "Arbitrator decisions which are fair and rational do not constitute misconduct." Inasmuch as the restrictions were imposed equally on each side, the court concluded that there was no misbehavior. In *Schmidt v. Finberg*, 942 F.2d 1571, 1575 (11th Cir. 1991) the court concluded that the arbitrators' refusal to postpone the hearing to allow testimony by one of the parties not only was not misconduct within the meaning of the provision expressly related to postponement, but was also not misbehavior by which the rights of the party had been prejudiced. In *Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191, 196 (2d Cir. 1991), the court rejected the unsuccessful party's contention that an arbitrator's refusal to resign in the face of another arbitrator's death was misbehavior.

In *Forsythe International, S.A. v. Gibbs Oil Company*, 915 F.2d 1017 (5th Cir. 1990), the court reversed a district court's vacatur on the ground, among others, that the arbitrator's refusal to take action in response to the successful party's misrepresentation constituted misbehavior. The three-member panel consisted of a representative from each of the two sides and a neutral chosen by the two representatives. Specifically, the unsuccessful party complained about discovery abuse by the successful party. The appellate court applied *de novo* review and found no basis for attacking the propriety of the panel's award.

In *Green v. Ameritech Corp.*, 12 F.Supp.2d 662 (E.D. Mich. 1998), the court rejected the unsuccessful party's claim that the arbitrator's delay in rendering his decision was misbehavior prejudicial to the party. The award, which was due within 21 days of the filing of post-arbitration briefs, was not issued until one year after the deadline.

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lambros*, 1 F.Supp. 2d 1337, 1343 (M.D. Fla. 1998), the court found no prejudice in the alleged misbehavior of the arbitrator in striking comments from the record and failing to obtain copies of the exhibits. In *Arbitration Between Trans Chemical Ltd. and China National Machinery Import and Export Corp.*, 978 F.Supp. 266, 306 (S.D. Tex. 1997), the court rejected the contention that an "irrational scheduling order" constituted misbehavior. In *Mantle v. Upper Deck Co.*, 956 F.Supp. 719, 730-731 (N.D. Tex. 1997), the court failed to find "misbehavior" in the arbitrator's refusal to return exhibits produced during the hearings and the arbitrator's review of documents without giving an opportunity to the other party to review the documents.

Inadequate notice of a hearing, alone, is not a ground to set aside an award, but failure to give notice can be raised as misconduct or misbehavior if it rises to that level. *See Gingiss International, Inc. v. Bormet*, 58 F.3d 328, 332 (7th Cir. 1995). Other cases have stated that lack of notice is a ground for vacatur if it prevents a party from presenting evidence. *See Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 995 (3d Cir. 1997); *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992), *cert. denied*, 506 U.S. 870 (1992).

These cases confirm that "misbehavior" is an attractive category to challenge any questionable conduct by an arbitrator, but the cases also confirm that such a challenge is seldom successful.

Arbitrator exceeded his powers

This is one of the express statutory grounds under the FAA. In resolving questions concerning the authority of an arbitrator, courts construe the agreement and resolve all doubts in favor of the arbitrators who have a great deal of flexibility in fashioning remedies. Thus, there is a heavy burden on those who claim that the arbitrators have exceeded their authority. *See H. L. Fuller Construction Co. v. Industrial Development Board*, 590 So. 2d 218, 223 (Ala. 1991).

In the *Fuller Construction* case the unsuccessful party contended that the arbitrators had exceeded their powers because they had ruled inconsistently in favor of the petitioner on its claims and the third party defendant on its defenses. The Supreme Court of Alabama concluded that it could not say that the arbitrators had exceeded their powers, but the court declined to analyze the issues in the arbitration sufficiently to disclose the basis for its conclusion. It simply observed that under the rules of the American Arbitration Association the arbitrator was empowered to grant any remedy or relief that is "just, equitable, and within the terms of the agreement of the parties." *Id.* at 223. Similarly, in *Maxus, Inc. v. Sciacca*, 598 So. 2d 1376, 1381 (Ala. 1992), the unsuccessful party argued that the arbitrator had exceeded his authority by failing to award interest. The agreement out of which the arbitration arose expressly provided that interest should accrue on the escrow payments in contention. Therefore, the court concluded, the arbitrator had exceeded his authority under the agreement. *Id.*

In *Huntsville Golf Development, Inc. v. Brindley Construction Co.*, 847 F.Supp. 1551, 1556 (N.D. Ala. 1992), the court explained that in determining whether the arbitrators have exceeded their authority under the arbitration contract, the court must give deference to the award when it is reviewed under the FAA. The court explained: "This court is not free to vacate an award based solely on an alleged error in contract interpretation." *Id.* Instead, the court further explained: "Where a rational ground for the arbitrators' decision can be inferred from the facts of the case, the award should be confirmed." *Id.* Moreover, an ambiguity in an arbitrator's decision accompanying an award which permits the

inference that the arbitrator may have exceeded his authority is not a reason for refusing to enforce the award if a contrary inference could also be drawn. *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 849 (9th Cir. 1989).

In *Kahn v. Smith Barney Shearson Inc.*, 115 F.3d 930, 933 (11th Cir. 1997), the court held that the arbitrators had exceeded their powers in ruling on the defendant's statute of limitations defenses since another court had ruled that the parties had chosen to have the limitations determination made by the court and not the arbitrators.

In *Green v. Ameritech Corp.*, 12 F.Supp.2d 662 (E.D. Mich. 1998), the district court vacated an arbitrator's award and remanded to a new arbitrator because the original arbitrator had not adhered to the arbitration agreement and failed to explain his decision as required under the agreement.

Failure to issue a mutual, final and definite award

In his law review article, Professor Hayford suggests that the term "mutual" simply means that the members of a multi-arbitrator panel, or at least a majority of the panel, must agree to the arbitral result. S.L. Hayford, *Law In Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 751 (1996). Otherwise, the terms "final" and "definite" seem self-evident.

In *Maxus, Inc. v. Sciacca*, 598 So. 2d 1376, 1381 (Ala. 1992), the court concluded that the award was indefinite, uncertain and imperfect because it did not finally dispose of all issues, and the circuit court should have set aside the award. Similarly, in *Wright v. Land Developers Construction Co.*, 554 So. 2d 1000, 1002 (Ala. 1989), the court observed that the award must be a final determination of the matters submitted or "there is no award." In that case the arbitrators had issued an award clearly labeled as an interim award, so it was not improper for the arbitrators to issue a second, final award.

Award violates fundamental public policy

This ground of vacatur is a creation of the courts. It is somewhat lame in view of the fact that the FAA preempts Alabama's strongly expressed public policy against pre-dispute arbitration agreements. Nevertheless, it seems to be a well-recognized ground for vacatur. For example, there is a strong public policy in Alabama against agreements that restrict the ability of a professional, such as a lawyer, to practice his procession, and an agreement that restricts a lawyer's ability to practice upon withdrawal from a firm is void as against public policy. *See Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston*, 678 So. 2d 765, 767-768 (Ala. 1996). Consequently, it would not make sense if an arbitrator could enforce an agreement that a court could not. The application of that public policy issue was the subject matter in two cases in which arbitrators' awards were challenged. *See Weiss v. Carpenter Bennett & Morrissey*, 143 N.J. 420, 672 A.2d 1132 (1996); *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y. 2d 146, 654 N.E. 2d 95, 630 N.Y.S. 2d 274 (1995).

The United States Court of Appeals for the Eleventh Circuit recognized the existence of a public policy ground for vacatur, but refused to apply it in *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993). According to the court, such a public policy must be well-defined and dominant and ascertainable by reference to the laws and legal precedence and not from general considerations of supposed public interest. The law defining statutory damages is not such a public policy that the arbitrator's failure to follow it would render an arbitration award subject to vacatur. *Id.*

It has been held that although the court must determine whether the arbitration award violates public policy, the court must rely upon the arbitrator's facts. *See Denver & Rio Grande Western R. Co. v. Union Pacific R. Co.*, 868 F.Supp. 1244 (D. Kan. 1994), *aff'd*, 119 F.3d 847 (10th Cir. 1997).

Arbitrator acted in manifest disregard of law

This ground is also a judicially-created basis for vacating an award. Its origin is in dictum from the opinion in *Wilko v. Swan*, 346 U.S. 427, 436 (1953). The Supreme Court has not further elaborated on the meaning and significance of this statement, but it has been developed in the federal circuit courts of appeals.

A party seeking to vacate an arbitration award on the ground of manifest disregard of the law may not proceed by merely objecting to the results of the arbitration. *O.R. Securities, Inc. v. Professional Planning Associates*, 857 F.2d 742, 747 (11th Cir. 1988).

When a claim arises under specific laws, the arbitrators are bound to follow those laws in the absence of a valid and legal agreement not to do so, but that does not mean that arbitrators can be reversed for errors or misinterpretations of the law. An award can be vacated where it was made in "manifest disregard" of the law. *See Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1460-1461 (11th Cir. 1997) (listing cases). In the *Montes* case, the 11th Circuit reversed the district court's confirmation of an award because counsel for the successful party repeatedly argued that the arbitrator was not compelled to follow the law but could do what is "right and fair and proper." *Id.* at 1459. This invitation to disregard the law coupled with the complete lack of support in the evidence for the arbitrator's ruling led the circuit court to find that the arbitrators had engaged in manifest disregard of the law.

In *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 1286 (1999), the court observed that to modify or vacate an award for manifest disregard of the law, a court must find that

(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and that

(2) the law ignored by the arbitrators was well-defined, explicit and clearly applicable to the case. *See DiRussa v. Dean Witter Reynolds Inc*, 121 F.3d 818, 821 (2d. Cir.1997). In *Halligan v. Piper Jaffray, Inc., supra*, 149 F.3d at 204, the court relied on the fact that the arbitrators had not explained their award although, as the court conceded, the arbitrators had no obligation to do so.

Award was arbitrary and capricious

The Eleventh Circuit has established in a series of recent opinions that it will vacate a commercial arbitration award if the award is deemed to be "arbitrary and capricious." This non-statutory ground was first recognized in *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410 (11th Cir. 1990), but the clearest articulation of that ground is found in *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993): "An award is arbitrary and capricious only if 'a ground for the arbitrator's decision cannot be inferred from the facts of the case.'" In *Ainsworth*, the arbitration panel, in the face of an explicit instruction from a federal district court that an award of damages to the claimant was required under controlling state law, nevertheless, failed to award damages, based on its conclusion that the claimant had suffered no harm. The court reasoned that it was not a question of deciding the law and getting it wrong; it was a denial of relief with no factual or legal basis.

In *Lifecare International, Inc. v. CD Medical, Inc.*, 68 F.3d 429, 435 (11th Cir. 1995), the court stated that an arbitration award will be vacated on an arbitrary and capricious ground "only if there is no ground whatsoever for the Panel's decision." *See Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 781 (11th Cir. 1994); *Robbins v. Day*, 954 F.2d 679, 683 (11th Cir. 1992), *cert. denied*, 506 U.S. 870 (1992).

Award was completely irrational

The "completely irrational" ground for vacatur of an award was first mentioned in a commercial arbitration case by the Third Circuit in *Swift Industries v. Botany Industries*, 466 F.2d 1125, 1129 (3d Cir. 1972). In *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997), the court stated:

> It is beyond peradventure that in the absence of any contractual terms regarding judicial review, a federal court may vacate or modify an arbitration award only if that award is "completely irrational," exhibits a "manifest disregard of law," or otherwise falls within one of the grounds set forth in 9 U.S.C. Sections 10 or 11.

See Mutual Fire Marine & Inland Insurance Co. v. Norad Reinsurance Co., 868 F.2d 52, 56 (3d Cir. 1989) (an award will not be subject to judicial revision unless it is "completely irrational").

The Eleventh Circuit does not appear to have adopted the "completely irrational" standard, but it seems functionally equivalent to the "arbitrary and capricious" standard.

Award fails to draw its essence from underlying contract

The "essence of the agreement" test originated in labor arbitration cases. *United Paper Workers International Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Tenth Circuit adopted the "essence of the agreement" standard despite its precedence exclusively in the collective bargaining context. *See Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634-635 (10th Cir. 1988); *Seymour v. Blue Cross-Blue Shield*, 988 F.2d 1020, 1022 (10th Cir. 1993).

The Eleventh Circuit does not appear to have adopted this ground for vacating an arbitration award.

Contractual standards of review

In *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), the arbitration agreement obligated the arbitrators to issue a written award that stated the bases of the award and included detailed findings of fact and conclusions of law. The agreement further authorized a federal district court to vacate, modify or correct the award where the arbitrator's findings of fact were not supported by substantial evidence or the arbitrators' conclusions of law were erroneous. The Ninth Circuit held that it was appropriate for the reviewing court to apply this contractual standard of review, rather than any judicial or statutory standards, in evaluating an arbitration award, if the parties so agreed. This opinion has been controversial. *See* A.F. Lowenfeld, *Can Arbitration Co-exist with Judicial Review?: A Critique of* Lapine v. Kyocera, *ADR Currents* 1 (September 1998).

Standards of appellate review

The grounds discussed above are the grounds that a federal district court, or in Alabama a circuit court, are to apply in reviewing the propriety of an arbitration award.

The Supreme Court of the United States has clarified the standard that an appellate court must apply in reviewing the district court's decision.

In reliance on the Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947-948 (1995), the Eleventh Circuit adopted a standard by which it would review a district court's factual findings in an arbitration case for "clear error" and examine its legal conclusions *de novo*. *Lifecare International, Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995); *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1188 (11th Cir. 1995).

The Supreme Court of Alabama has left some mystery as to how it should review a decision to confirm an arbitration award. In *Maxus, Inc. v. Sciacca*, 598 So. 2d 1376, 1379 (Ala. 1992), the court implied that the FAA procedures should be followed. On the other hand, in the later decision in *Pruett v.*

Williams, 623 So. 2d 1115, 1116 (Ala. 1993), the Supreme Court of Alabama purported to be following the procedures of Section 6-6-15. That section provides that the notice of appeal together with the award and the arbitration file must be delivered within ten days to the court to which the award was originally returnable. The clerk must enter the award as the judgment of the court. Thereafter, unless within ten days the court sets aside the award for one of the causes specified in Section 6-6-14, the judgment shall become final and an appeal shall lie as in other cases.

If the circuit court sets the award aside, then that decision is also appealable.

It is not clear from the Alabama arbitration act what sort of procedures are contemplated. In *Commercial Union Insurance Co. v. Ryals*, 355 So. 2d 684 (Ala. 1978), the trial court heard evidence and issued a judgment confirming the award which became the subject of the appeal to the Supreme Court of Alabama.

The Supreme Court of Alabama has not been clear about what deference, if any, it will give to the circuit court's review of the award. In *Maxus, Inc. v. Sciacca*, 598 So. 2d 1376, 1379 (Ala. 1992), the court discussed the "standard of review and procedure a court in Alabama is to utilize in its review of arbitration proceeding." It did not, however, discuss the relative role of the circuit court and the supreme court. The supreme court does, however, appear to have reviewed the arbitration award *de novo* without giving any particular deference to the decision of the circuit court. This would be consistent with the *First Options* decision of the Supreme Court of the United States.

In the later case of *Pruett v. Williams*, 623 So. 2d 1115, 1116 (Ala. 1993), the court affirmed the circuit court judgment without discussing its standard of review.

Remedy on Remand

The district court may make an order modifying or correcting the award where there was any evidence of miscalculation, where the arbitrators issued an award upon a matter not submitted to them, or where the award is imperfect in matter of form not affecting the merits. 9 U.S.C. Section 11.

The FAA does not prescribe what action is to be taken if the award is vacated. It does say that where an award is vacated, and the time within which the agreement required the award to be made has not expired, then the court may direct a rehearing by the arbitrators. 9 U.S.C. Section 10(a)(5). This doesn't explain what remedy exists if the arbitrators' award is vacated and the time has expired. In *Green v. Ameritech Corp.*, 12 F.Supp.2d 662 (E.D. Mich. 1998), the time for issuing the award had expired long before the award was issued; indeed, that delay was one of the grounds for the petition to vacate. The district court vacated an arbitrator's award and remanded to a new arbitrator. The court observed that remand to the original arbitrator is available when an arbitration award is "ambiguous." Nevertheless, the FAA does not compel a rehearing or remand to a new panel.

In *Forsythe International, S.A. v. Gibbs Oil Company*, 915 F.2d 1017, 1019-1020 (5th Cir. 1990), the district court vacated the arbitrators' award and remanded the matter to a different arbitration panel for further arbitration. The court concluded that if the district court had remanded the matter to the same arbitration panel for clarification of its award, it would not be appealable. *Id.* at 1020 n. 1. By remanding the case to a different arbitration panel, however, the award became appealable. *Id.* at 1020. The appellate court concluded that circumstances did not warrant vacatur, so it reversed the district court and did not review the question whether the remand should be to the same or a different panel.

In *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1464 (11th Cir. 1997), the appellate court reversed the district court's confirmation of the arbitration award and remanded the case to the district court with instructions to refer the matter to a new arbitration panel, but the court did not discuss whether remand to the same arbitration panel was an acceptable alternative.

In *Teamsters-Employer Local No. 945 Pension Fund v. Acme Sanitation Corp.*, 963 F.Supp. 340, 353 (D.N.J. 1997), the arbitrator based his award on evidence presented at a hearing which the unsuccessful party did not attend as the result of an "inadvertent misunderstanding." The district court decided to vacate the award (which amounted to a default judgment) and remanded the case to the original arbitrator to reopen the arbitration proceedings to allow the unsuccessful party the opportunity to present its defenses.

Conclusion

Although it is frequently repeated that an arbitrator's award is final, the cases discussed above show that there are many grounds for review. Indeed, these cases suggest that if a court can be convinced that an award is a substantial injustice to the unsuccessful party, then the court can find a valid ground for vacatur. ■

William H. Hardie

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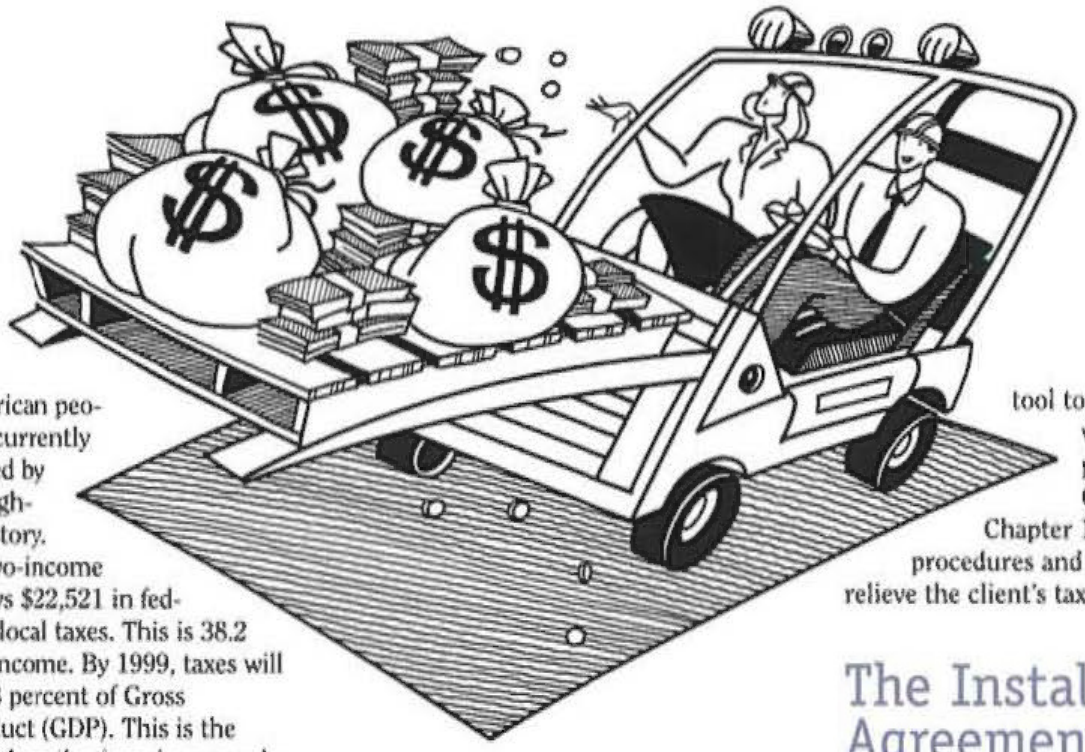
Helping Clients with Tax Debts

By Marion E. Wynne



The American people are currently burdened by some of the highest taxes in history. The median two-income family now pays $22,521 in federal, state and local taxes. This is 38.2 percent of its income. By 1999, taxes will constitute 20.3 percent of Gross Domestic Product (GDP). This is the highest tax level on the American people since 1945, the end of World War II.[1]

In 1948, the average family of four paid approximately 3 percent of its income to federal taxes. By 1995, this payment had grown to 24.5 percent of the family's income. The average family of four in 1995 paid about 40 percent of its income for federal, state and local taxes. Before 1913, there was a constitutional restriction prohibiting an income tax. The United States Constitution required any direct tax to be apportioned among the states according to population. In 1913, the 16th Amendment removed this restriction. Later that year the modern income tax took effect. In 1913, the total tax per person was $23.35. By 1948, it was $349.06. In 1964, the total tax per person was $722.78. By 1983, it was $2,845.38.[2]

The tax burden has become so great that there is an enormous amount of unpaid taxes due and owing by the American people. The uncollected tax debt at the present time is over $40 billion dollars.[3] Many hardworking Americans are suffering from the intense and heavy-handed collection measures of the Internal Revenue Service (IRS). Every day, the IRS is hammering citizens who owe back taxes. Some deserve it, and some don't. However, they are all entitled to representation. As an attorney, you are in a select class of professionals who can represent clients before the IRS. You can help your client face the IRS collection process and deal with it in the way that is in his best interest. You can help your client save money and resolve his tax debt problem.

The purpose of this article is to discuss ways in which you can help your client who owes the IRS. You can assist your client in negotiating an installment agreement or an offer in compromise. You can help your client abate penalties and interest. You can direct your client toward compliance and help him stay in compliance. The Bankruptcy Code is another available tool to assist the client with serious tax problems. Both Chapter 7 and Chapter 13 have helpful procedures and remedies to relieve the client's tax burden.

The Installment Agreement

Section 6159(a) of the Internal Revenue Code (IRC) authorizes the service to enter into installment payment agreements with delinquent taxpayers. An installment agreement is a voluntary monthly payment schedule agreed upon by the debtor and the IRS. The benefits of the installment agreement are that once it is entered into, wage garnishments and bank levies can be released. The client will have a set payment plan he can factor into his budget. As long as he makes the plan payments, the IRS will leave him alone.

There are risks in contacting the IRS Service Center about an installment agreement. The service may initiate a fast attack on the client's assets or record a lien once they learn a tax professional is involved.[4] An installment plan does not suspend the running of interest on the tax debt. Thus, a claim may double or triple in size before it is paid off.

The IRS will want complete financial information on the taxpayer before agreeing to certain payment terms. The

client will have to fill out Form 433A, which is a financial statement in a form approved by the Service. If your client is in business for himself, then he will have to complete the Form 433B. The IRS collection procedures determine the monthly amount. These procedures allow the debtor a certain amount for expenses based on national and local standards for necessary living expenses.

The IRC authorizes the Service to alter or cancel an installment agreement if the taxpayer provided incorrect financial information, or if the taxpayer fails to make the payments as provided in the agreement.[5] Also, the taxpayer must provide updated statements of his financial condition upon request.[6]

The installment agreement serves a different client than the offer in compromise. The installment agreement is appropriate when the taxpayer cannot pay his tax liability in a lump sum and has no equity in assets against which to borrow, but has enough income to pay the tax over a period of time. If the taxpayer has limited assets and insufficient income to pay the tax after paying the necessary monthly living expenses, then the offer in compromise is the better procedure. The IRS now encourages use of installment agreements and offers in compromise when the taxpayer's financial situation makes the procedures appropriate.[7]

Offer in Compromise (OIC)

If the IRS accepts an offer in compromise, the tax debtor will be allowed to pay the tax liability by paying a lesser amount than the full amount in complete satisfaction of the liability.[8] This lesser amount will satisfy the tax debt, interest and penalties. If the IRS will accept the offer in compromise the taxpayer may be able to avoid filing for relief under the bankruptcy code. However, counsel should be alert to the tolling which is incurred when an offer in compromise is made. The 240-day period for assessment is a time requirement which must be met if a particular tax is to be discharged. This time requirement is tolled during the period an offer in compromise is pending plus 30 days.[9]

The new Taxpayer Bill of Rights (Taxpayer Bill of Rights III) makes it easier than ever for taxpayers to get an offer accepted. As of July 22, 1998, the IRS must adopt a liberal acceptance policy for offers in compromise to provide an incentive for taxpayers to continue to file tax returns and pay their taxes. Congress has instructed the IRS that it should make it easier for taxpayers to enter into offer in compromise agreements.

Two principal reasons exist for the IRS to accept an OIC. They are (1) doubt as to liability and (2) doubt as to collectibility. If the Service determines that the collection ability of the government is good, then the tax debt cannot be compromised. If the taxpayer has assets sufficient to pay the tax this procedure will not work. It will not succeed if the taxpayer has sufficient income to meet necessary living expenses and pay the tax debt. A necessary living expense is defined by the Service, not by the taxpayer.[10]

To file an OIC the taxpayer must submit the offer on Form 656. He also must file a current financial statement on Form 433-A if he is an individual taxpayer or a sole proprietor. The financial information is put on Form 433-B if the taxpayer is a corporation or partnership. Form 433-B is additionally used for a sole proprietor's business.

Counsel should stress to the taxpayer the importance of complete honesty in completing the financial forms. It is a felony (punishable by a $10,000 fine and/or up to three years in prison) to make a false statement on the financial forms or other documents filed in support of the OIC. A taxpayer who tries to conceal or undervalue assets is courting prosecution. The same is true for one who does not disclose all sources of income. As this writer often tells clients considering bankruptcy, the bankruptcy court

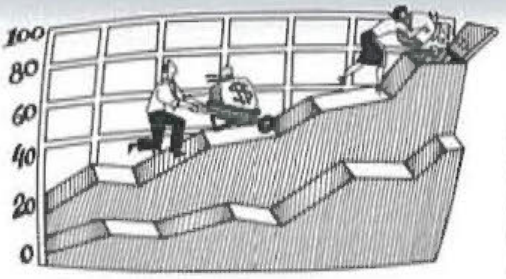
is there to help an honest debtor who makes a full disclosure. But, it is a federal felony to make a false statement on your bankruptcy schedules. The same is true regarding offers in compromise.

Once the Service accepts an OIC, it can still be lost if the taxpayer is not careful. The taxpayer must file all future returns in a timely manner and pay all estimated taxes when due. If he does not, the Service can cancel the agreement and seek collection of the full tax debt that was compromised.[11] The statute of limitations for assessment is suspended for the period of time the OIC is pending and for one year thereafter. The offer is considered pending until the compromised amount is paid in full. The acceptance of the offer terminates the taxpayer's right to challenge the amount of the tax debt that has been compromised.[12]

The OIC is a tremendous benefit to the client if it is successfully completed. Your client will be able to satisfy past due tax debt, including interest and penalties, for a fraction of the actual amount owed. Clients who have offers accepted and who carry out the provisions of the agreement are often able to avoid filing bankruptcy.

Abatement of Penalties and Interest

The IRS assesses penalties for many reasons. There is a penalty for failure to file a return, filing a return late (even one day late), substantial underpayment of estimated taxes or the final yearly tax obligation, negligence in filing the return, and for civil fraud. The assessment of penalties can be abated for reasonable cause. Reasonable cause can be serious illness, destruction of tax records by casualty, inability to obtain tax records, and reliance on advice by a competent tax advisor.[13] This is an area that calls for some creativity on the part of counsel for the taxpayer. The IRS has abated penalties for such reasons as the Gulf War, dishonest bookkeepers, alcoholism, drug addiction, bad business decisions, and numerous other reasons. The IRS will seriously



consider abating a penalty when the failure causing the penalty was something outside the control of the taxpayer. The request for penalty abatement can be in a letter to the IRS Service Center. The letter should thoroughly explain the factors that caused the particular failure. Corroboration of the events is helpful. Items such as medical reports and statements from fact witnesses will bolster the request.

A request for abatement of a penalty based on reliance on erroneous IRS advice is made on Form 843 filed with the IRS Service Center where the return was filed. A copy of the incorrect written advice from the IRS should accompany the form.[14]

The IRS can abate assessments of interest for specific statutory reasons. See I.R.C. Section 6404. One reason especially relevant to the South Alabama area is that interest on the underpayment of tax liabilities can be abated for individuals living in presidentially declared disaster areas.[15] It is not within the scope of this article to discuss the other reasons interest can be abated. The reader is referred to I.R.C. Section 6404.

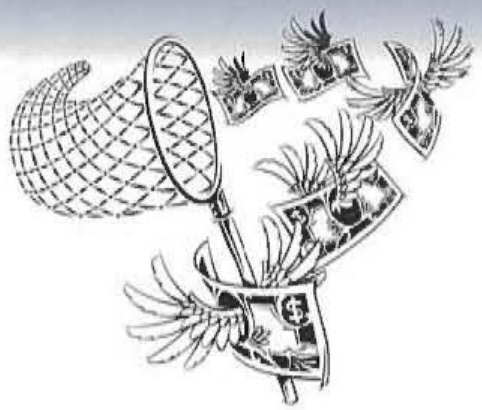
Taxpayer Remedies in the Bankruptcy Code

When the taxpayer does not have enough income to pay an installment agreement and he cannot get an offer in compromise which is within his ability to pay and when the abatement of interest and/or penalties is not allowed or is

not enough to sufficiently relieve the tax burden, then counsel must look to the Bankruptcy Court to assist the client. The Bankruptcy Code offers three avenues of relief: Chapter 7, Chapter 11 and Chapter 13. This article will deal with Chapter 7 and Chapter 13. The provisions of Chapter 11 are best left for another time.

We have federal income taxes, state income taxes, local property taxes and local sales taxes. If a business is involved, there are payroll taxes, sales taxes, employment taxes and Social Security payments. Can these taxes be discharged in bankruptcy? In some cases, yes. Personal income taxes can be discharged in bankruptcy, if certain criteria are met. In some situations, sales taxes, excise taxes, property taxes and payroll taxes can be discharged.

What are the criteria that must be met before personal income taxes can be discharged? First, the tax must be over three years old. In other words, the tax year in question must be three years preceding the filing of the bankruptcy.[16] If the return for 1995 taxes is due April 15, 1996, any bankruptcy filed before April 16, 1999 will result in the tax being non-dischargeable. If an extension is filed, then the time the three-year period begins to run is also extended. *In re Gidley*, 151 B.R. 952 (M.D. Fla. 1992).



The second criterion which must be met for personal income taxes to be dischargeable is that the tax return must have been filed at least more than two years before the bankruptcy is filed.[17] The date of filing is the date the return is received by the taxing entity, not the date the return is mailed by the taxpayer. *U.S. v. D'Avanza*, 132 B.R. 462 (M.D. Fla. 1991). If the taxpayer fails to file a return and the IRS files a substituted return for the taxpayer, this does not count as a return filed by the taxpayer to start the two-year period running. *In re Clements*, 107 B.R. 767 (Wyo. 1989). The tax return must be filed by the taxpayer.

Third, the tax return filed must be non-fraudulent and the taxpayer must not be engaged in willful evasion of a tax liability.[18] Understatement of income and failure to cooperate with the IRS can be considered evidence of fraud. *In re Peterson*, 160 B.R. 385 (D.Wy 1993). *In re Graham*, 1994 Bankr. Lexis 1256 (Bkrtcy E.D. Pa 1994), is a case that has a thorough discussion of fraud and evasion as it relates to tax claims in bankruptcy.

The fourth criterion is that the tax must be assessed more than 240 days prior to the bankruptcy petition being filed.[19] This period is extended if an offer in compromise has been filed. It is extended for the period of time the offer is pending plus 30 additional days. Knowing the date of assessment is extremely important. An error in determining this date could cause your client's tax debt to be non-dischargeable. The date of filing the tax return is not the date of assessment within the meaning of the Bankruptcy Code. *In re Hayes*, 166 B.R. 946 (Bkrtcy. D.NM 1994). The IRS makes the assessment by recording the tax debt of the taxpayer in the Office of the Secretary of the Treasury. IRC sec. 6203. If the taxpayer requests, the Secretary must furnish the taxpayer a copy of the record of assessment. The date of the assessment is the date the summary record is signed by an assessment officer. The summary record gives the identification of the taxpayer, the character of the liability assessed, the tax period and the amount of the assessment.[20] The summary record may be obtained by requesting a copy from the local service center or by a Freedom of Information request. Counsel should request this summary record before filing a bankruptcy to discharge tax debt. This is the only way to be sure the 240-day period is properly calculated.

Even if a tax debt meets the four cri-

teria, the discharge of the tax debt will not bring complete relief to the debtor if a tax lien has been filed and the debtor has property to which the lien is attached before the filing of the bankruptcy. In this case the lien secures the tax debt and the IRS can sell the property subject to the lien with the sale proceeds applying the tax debt secured by the lien. *In re Verran*, 623 F.2d 477 (1980); *In re Isom*, 95 B.R. 148 (9th Cir. 1988); 901 F.2d 744 (9th Cir. 1990).

Property taxes assessed more than one year before the filing of the bankruptcy are dischargeable.[21] However, since these taxes are secured by the property they usually are paid regardless of the bankruptcy.

Debtors who file for bankruptcy protection under Chapter 13 can also discharge taxes. Chapter 13 differs from Chapter 7 in that a Chapter 13 debtor pays his creditors a percentage of the debt owed. The unsecured creditors must be paid a dividend that is greater than they would get if the debtor was liquidated. This allows the taxpayer to pay his tax debt over an extended period of up to 60 months.[22] The taxing authority is bound to the payment plan approved by the court. The collection efforts of the authority are stayed as long as the debtor is under the protection of the Bankruptcy Court.[23]

Under Chapter 13 more types of taxes and penalties may be dischargeable. There are taxes, which are not discharged under Chapter 7, but are discharged under Chapter 13. Taxes that are not dischargeable under Chapter 7 because of Section 523 of the Bankruptcy Code are dischargeable under Chapter 13 because the tax portions of Section 523 do not apply in Chapter 13 cases. Even in Chapter 13 the debtor must pay priority taxes in full with interest. But, the debtor may not have to pay non-dischargeable taxes that are non-dischargeable under Section 523.

When a taxpayer files for relief under Chapter 13, the IRS may not continue to add penalties to the tax debt owed. In some cases, even post-petition interest ceases. Unsecured priority tax debts do not accrue interest under Chapter 13.[24] However, fully secured tax claims are entitled to accrue interest during the Chapter 13.[25] However, in the Chapter 13 plan the interest rate paid to the IRS can be substantially less than would be paid on the tax debt outside of the Chapter 13.[26]

In some cases, even payroll taxes and sales taxes may be discharged. If the Chapter 13 plan provides for full payment of priority tax claims and the IRS fails to file a proof of claim before the bar date, the tax can be discharged with no payment to the IRS. This result assumes the tax claim is also unsecured.[27] This is also true with regard to the 100 percent penalty assessment.[28] The 100 percent penalty is the name for the obligation imposed on the person who is responsible for collecting and paying employee withholding taxes and fails to do so. In fact, the 100 percent penalty is a tax, and it is treated as a tax in the Bankruptcy Code.[29]

As was discussed earlier, under Section 523 taxes for which returns have not been filed for over two years before the filing of the bankruptcy are not dischargeable under Chapter 7. These taxes may be reduced or even relieved in a Chapter 13 composition plan. A composition plan is a plan in which the unsecured creditors are paid less than 100 percent of their claims. The same is true for taxes that have not been assessed 240 days before the filing of the bankruptcy.

Conclusion

Use the installment plan to help a taxpayer whose tax debt is not too large to be paid in regular monthly payments over a reasonable time. The offer in compromise is the path to take if the

tax debt is too large to pay with the installment method. You can help the delinquent taxpayer get relief from penalties and interest when there are legitimate reasons for failure to file or failure to pay. The last resort is the filing of a Chapter 7 or a Chapter 13 bankruptcy; both chapters are powerful tools to give the delinquent taxpayer relief and a chance for a fresh financial start. ■

Endnotes

1. Claire M. Hintz, "Tax Burden on American Families Rises Again," *Tax Foundation Special Report*, November 1997.
2. *World Book Encyclopedia*, vol. 19, (1986).
3. U.S. Tax Marketing Corp., "Second Chance," p.2.
4. Morgan D. King, "Discharging Taxes in Bankruptcy," King's Press, 1995, p. 73.
5. IRC Sec. 6159(b).
6. IRC Sec. 6159(b)(4).
7. "Dealing with the IRS," Practitioners Publishing Company, 5th ed., 1997, p. 1405.01
8. IRC Sec. 7122.
9. 11 U.S.C. Sec. 507(a)(8)(A)(ii).
10. (Reg. 301.7122-1(a).
11. IRM 57(10)5.1(9).
12. All these terms and conditions are part of the language in the offer form (Form 656). They become provisions of the contract between the taxpayer and the IRS.
13. IRM (20) 130.
14. I.R.C. sec. 6404(f); Reg. 301.6404-3(d).
15. Taxpayer Bill of Rights II, July 30, 1996.
16. 11 U.S.C. Sec. 507(a)(8)(A).
17. 11 U.S.C. Sec. 523(a)(1)(B)(ii).
18. 11 U.S.C. Sec. 523(a)(1)(C).
19. 11 U.S.C. Sec. 507(a)(8)(A)(ii).
20. IRS Reg. Sec. 301.6203-1.
21. 11 U.S.C. Sec. 507(a)(8)(C).
22. *In re Norton*, 15 B.R. 623 (Pa. 1981).
23. *U.S. v. Norton*, 717 F.2d 767 (1984)
24. *In re Wakehill Farms*, 123 B.R. 774 (Ohio, 1990).
25. *In re Fisher*, 27 B.R. 542, (Kan. 1983).
26. *In re Frost*, 47 B.R. 961 (D.C. 1985).
27. *In re Daniel*, 107 B.R. 798 (Ga. 1989).
28. *Matter of Workman*, 108 B.R. 826 (Ga. 1989).
29. *Solelo v. U.S.*, 436 U.S. 268 (1978).

Marion E. Wynne

Marion E. Wynne is a partner in the firm of Wilkins, Bankester, Biles & Wynne, P.A. with offices in Baldwin County, Alabama. He received his B.A. from Occidental College in Los Angeles in 1964. He received his J.D. Degree from the University of Southern California Law School in 1967. He was admitted to the California State Bar and the 9th Circuit in 1968 and to the Alabama State Bar and the 5th Circuit in 1976. Wynne is a past president of the Baldwin County Bar Association, and is presently on the Board of Governors of the Alabama Trial Lawyers Association. He is a member of the Alabama State Bar, the Baldwin County Bar Association, the Association of Trial Lawyers of America and the Alabama Trial Lawyers Association.

It is ordered that Rule 6.B., Alabama Mandatory Continuing Legal Education Rules and Regulations, be amended to read as follows:

"B. As soon as practicable after January 31 of each year, the Chairman of the Commission on Continuing Legal Education shall furnish to the Secretary of the Alabama State Bar a list of those attorneys who have failed to file either an annual report for the previous calendar year, as required by Rule 5, or a plan for making up the deficiency as permitted by Rule 6.A. In addition, as soon as practicable after the first anniversary of an attorney's admission to the Bar or of an attorney's being licensed to practice law in Alabama, the Chairman shall furnish to the Secretary of the Alabama State Bar a list of those attorneys who were required to complete, but failed to complete, the professionalism course required by Rule 9.A.

"The Secretary shall thereupon forward these lists of attorneys to the Chairman of the Disciplinary Commission.

"The Chairman of the Disciplinary Commission shall then serve, by certified mail, each attorney whose name appears on those lists with an order to show cause, within sixty (60) days (i.e., within 60 days from the date of the order) why the attorney's license should not be suspended at the expiration of the sixty (60) days. Any attorney so notified may within the sixty (60) days furnish the Disciplinary Commission with an affidavit:

(a) indicating that the attorney has in fact earned the 12 required CLE credits during the preceding calendar year or has since that date earned sufficient credits to make up any deficiency for the previous calendar year or

(b) indicating that the attorney has in fact completed the professionalism course required by Rule 9.A or

(c) setting forth a valid excuse (illness or other cause) for failure to comply with either requirement.

"As soon as practicable after March 15 of each year, the Chairman of the Commission on Continuing Legal Education shall furnish the Secretary of the Alabama State Bar a supplemental list of any attorneys who filed a deficiency plan as permitted by Rule 6.A. The same procedures, requirements, and sanctions applicable to the attorneys on this initial delinquent list shall apply to the attorneys on this supplemental list.

"At the expiration of sixty (60) days from the date of the order to show cause, the Disciplinary Commission shall enter an order suspending the law license of each attorney who has not, pursuant to the third paragraph of this Rule 6.B., filed an affidavit that the Disciplinary Commission considers satisfactory.

"At any time within ninety (90) days after the order of suspension, an attorney may file with the Disciplinary Commission an affidavit indicating that the attorney has earned 12 approved CLE credits (or the number of credits the attorney was deficient) and wants those credits assigned to the year for which the attorney was in noncompliance with Rule 3, or indicating that the attorney has completed the professionalism course required by Rule 9.A. If the Disciplinary Commission finds the affidavit satisfactory, it shall forthwith enter an order reinstating the attorney.

"At any time beyond ninety (90) days from the order of suspension, an attorney shall file with the Disciplinary Board an affidavit like that described in the preceding paragraph, but such an attorney must file with that affidavit a petition for reinstatement (see Rule 28, Alabama Rules of Disciplinary Procedure).

"An attorney may appeal to the Disciplinary Board from an order of suspension or an order denying reinstatement entered by the Disciplinary Commission. Additionally, any affected attorney may appeal any action of the Disciplinary Board to the Supreme Court in accordance with the Rules of Disciplinary Procedure.

It is further ordered that the following note from the reporter of decisions be added to follow Rule 6:

"Note from the reporter of decisions: The order amending Rule 6.B., effective September 1, 1999, is published in that volume of *Alabama Reporter* that contains Alabama cases from So. 2d."

It is further ordered that this amendment be effective September 1, 1999.

Hooper, C.J., and Maddox, Houston, Cook, See, Lyons, Brown, and Johnstone, JJ., concur.

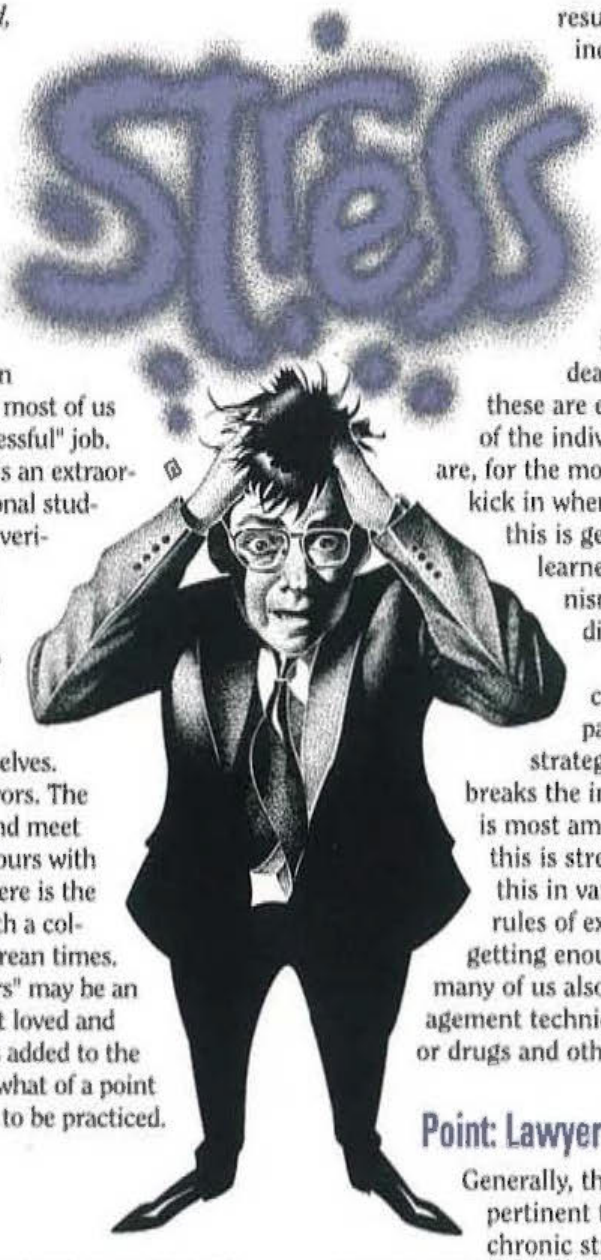
Stress! Stressed! Stressed Out!

By William C. Freeman, M.D.

stress (stres) (series) *n. **3a)** mental or physical tension or strain, **b)** urgency, pressure, etc., causing this.*

stressed (strest) *adj. adjective describing manifestations of stress*

stressed out (strest' out') *adj. tired, nervous, or depressed as a result of overwork, mental pressure, etc. (equivalent to noun "burnout")*



Point: Lawyers are in a stressful occupation.

Most people think of their occupation as stressful. Even the guy who tests mattresses for sleep comfort feels stressed at times. There is even some sense of pride exhibited or felt by most of us who perceive ourselves as having a "stressful" job. In reality, though, the legal profession is an extraordinarily stressful occupation. Occupational studies have verified this. Studies have also verified a significantly higher incidence of stress-related problems and burnout in the legal profession.

So why is being a lawyer so stressful? Among the many reasons are that lawyers deal with people, people who are often in conflict and stressed themselves. Lawyers face opponents in most endeavors. The pressures to produce, manage billing and meet deadlines often require long working hours with little time for family and recreation. There is the added stress of being in a profession with a collective bounty in place since Shakespearean times. The quote, "First, let's kill all the lawyers" may be an indication that lawyers are not the most loved and respected group around. For many, this added to the equation makes practicing law as somewhat of a point to be proven as opposed to a profession to be practiced.

Point: Lawyers get stressed. Lawyers cope.

Mechanisms of stress and the stress reaction are basically as follows: A series of external events interact with the internal mechanisms of adaptation of the individual which includes the coping strategy of that individual. This results in either adequate or inadequate management of that stress.

Inadequate handling of stress can result in a multitude of problems which include emotional and physical. These, in turn, can produce major difficulties in the interpersonal, occupational and social areas of one's life. Coping strategies themselves often can compound the problem. Think about the lawyer who turns to alcohol or other substances in an attempt to cope. As noted previously, external events include the things that lawyers have to deal with on a daily basis, and, again, these are extraordinary. The internal mechanism of the individual (reactions or methods) which are, for the most part, automatic and unconscious, kick in when the individual is stressed. A part of this is genetically determined and a part is learned behavior. This part of the mechanism is possible to change but somewhat difficult for most of us to do.

External events may also be difficult to alter. This brings us to the third part of the equation which is a coping strategy, the component that often makes or breaks the individual and also the component that is most amenable to change. A common term for this is stress management. Most of us practice this in varying degrees and know the general rules of exercising consistently, eating right, getting enough rest, and taking breaks. However, many of us also engage in maladaptive stress management techniques such as excessive use of alcohol or drugs and other behaviors that can be detrimental.

Point: Lawyers Need Help.

Generally, there are two types of stress that are pertinent to this discourse, acute stress and chronic stress. Acute stress can be exemplified by being called on in law school. At that moment the "fight or flight" reaction begins. A small area of the brain called the

Symptoms of stress include:

PHYSICAL

Tension

Increased use of alcohol

Hypervigilancy

Physical disorders: Ulcers, colitis, headaches, allergies, asthma, nausea, high blood pressure

Sleep disorders

Fatigue

Reduced sexual drive

Frequent colds/infections

PSYCHOLOGICAL

Worry

Confusion

Fear

Fight/Flight

Panic

SOCIAL

Job performance

Disconnection/isolation

Accident frequency

Symptoms of burnout include:

Fatigue

Hopelessness

Lack of motivation

Overwhelmed

Low energy

Depression

OCCUPATIONAL

Late to or absent from appointments or court appearances

Failure to return phone calls

Forgetful behavior

Disorganized office and work

Isolation from colleagues

Sadness

Eating alone or not eating

Obviously it is in our best interest to learn and practice preventive coping techniques before stress becomes overwhelming.

Suggestions include:

- Break down projects into manageable pieces. Take things one day at a time, one piece at a time.
- Maintain realistic expectations of yourself, personally and professionally.
- Ask for help.
- Set and maintain personal and professional boundaries.
- Take care of yourself physically, mentally and emotionally.
- If you have a problem with alcohol or drugs call the Alabama Lawyer Assistance Program for confidential assistance.

Get serious about managing your stress. You'll feel better, function better and probably see your family and friends smile more often when they are around you. ■

locus coerulus starts pumping adrenaline and the *vagus* nerve becomes activated and sends signals to the rest of the body. This accounts for the rapid heart rate, sweaty palms, nervous feeling and other reactions that occur under these circumstances.

Chronic stress, which initially has a similar mechanism, at some point recruits other areas of the brain. Therefore, in addition to anxiety, and the "fight or flight" phenomena, individuals will experience symptoms of depression, anxiety and other emotional discomforts that do not subside when the stressor is removed. How one manages the acute stress dictates the occurrence or nonoccurrence of the chronic stress reaction.

I have always been somewhat amazed at how we are able to approach our businesses in a very efficient manner when it comes to identifying and solving problems but are not very good at taking our own inventory and treating ourselves in the same manner. We are either in denial about the problems we do have or make excuses not to deal with them. We continue to proceed day to day, month to month, and year to year relying on the same old patterns of behavior, expecting results to be different until we eventually are stressed out or burned out.

Point: Lawyers should take inventory and corrective action.

It is especially critical and necessary that the individual lawyer periodically take a personal inventory. We need to realistically look at the components of stress, the external factors in our lives, the internal factors of adaptation unique to each of us and the coping mechanisms we employ to handle stressful situations. Are they working? If not, why not? What are some alternatives we can choose? It is always worthwhile to ask two trusted friends or family members who can be honest and objective to give you feedback. We need to approach ourselves like a business. Address the problem areas, and hire a consultant if needed (stress management professionals). The purpose is to identify and intervene early to halt the process before things get out of hand and our well-being is compromised. Stress will always be with us. ■

William C. Freeman, M.D.

William C. Freeman, M.D. is in the private practice of general psychiatry with Montgomery Psychiatry & Associates. He has been a member of the Alabama State Bar since 1981 and is associate medical director for Meadhaven Emotional Health Program, Baptist Medical Center, Montgomery.

It is ordered that Rule 10, Alabama Rules of Disciplinary Procedure, is amended to read as follows:

"Rule 10. Noncompliance With Alabama State Bar Mandatory Continuing Legal Education Rules

(a) "Suspension for Noncompliance.

(1) "A lawyer is subject to the continuing legal education (CLE) requirement of Rule 3, Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations, and to the professionalism requirement of Rule 9.A., Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations, and will be deemed to not be in compliance with those rules if the lawyer:

(A) "Fails to earn twelve (12) approved CLE credits by December 31 of a particular year;

(B) "Fails to file an annual report as required by Rule 5, Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations;

(C) "Fails to complete an approved plan for making up CLE credit deficiencies as required by Rule 6, Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations; or

(D) "Fails to complete the professionalism course as required by Rule 9.A., Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations.

(2) "As soon as is practicable after January 31 of each year, the Chairman of the Commission on Continuing Legal Education shall furnish to the Secretary of the Alabama State Bar the list of those lawyers deemed not in compliance with Rule 3, Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations.

(3) "As soon as practicable after the first anniversary of a lawyer's admission to the Bar or of a lawyer's being licensed to practice law in Alabama, the Chairman of the Commission on Continuing Legal Education shall furnish to the Secretary of the Alabama State Bar the list of those lawyers deemed not in compliance with Rule 9, Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations.

(4) "The Chairman of the Disciplinary Commission shall then serve, by certified mail, each lawyer whose name appears on the list compiled pursuant to paragraphs (a) (2) and (a) (3) above with an order to show cause, within sixty (60) days, why the lawyer's license should not be suspended at the expiration of the sixty (60) days. Any lawyer so notified may, within sixty (60) days, furnish to the Disciplinary Commission an affidavit (a) indicating that the lawyer has complied with the CLE requirement before the expiration of the sixty (60) days, or (b) indicating that the attorney has completed the professionalism course required by Rule 9.A., or (c) setting forth a valid excuse for failure to comply with either requirement because of illness or other good cause.

(5) "At the expiration of sixty (60) days from the date of the order to show cause, the Disciplinary Commission shall enter an order suspending the license to practice law of each lawyer who fails to file an affidavit satisfactory to the Disciplinary Commission as described in paragraph (a) (3) above.

(B) "Reinstatement.

(1) "At any time within ninety (90) days after the order of suspension, a lawyer may file with the Disciplinary Commission an affidavit indicating compliance with Rule 3 or Rule 9.A., Alabama State Bar Mandatory Continuing Legal Education Rules and Regulations, and, if the affidavit is satisfactory to the Disciplinary Commission shall forthwith enter an order reinstating the lawyer.

(2) "If a lawyer has been suspended by the Disciplinary Commission for more than ninety (90) days, the lawyer shall be required to file with the Disciplinary Board an affidavit, as described in paragraph (a) above, together with a petition for reinstatement as provided in Rule 28 of these Rules and Appendix A to these Rules.

(c) "Appeals.

"A lawyer may appeal to the Disciplinary Board from an order of suspension or an order denying reinstatement entered by the Disciplinary Commission.

Additionally, an affected lawyer may appeal the action of the Disciplinary Board of the Alabama Supreme Court in accordance with the procedure set out in Rule 12 (f) of these Rules."

It is further ordered that the following note from the reporter of decisions be added to follow Rule 10:

"Note from the reporter of decisions: The order amending Rule 10, effective September 1, 1999, is published in that volume of *Alabama Reporter* that contains Alabama cases from ____So. 2d."

It is further ordered that this amendment shall be effective September 1, 1999.

Hooper, C.J., and Maddox, Houston, Cook, See, Lyons, Brown, and Johnstone, JJ., concur.

ASB Pro Bono Award Winners

Five Alabama attorneys provided outstanding service to the Alabama State Bar Volunteer Lawyers Program and were honored with the 1999 Pro Bono Award at the state bar's Annual Meeting in Birmingham. The recipients of this year's Pro Bono Award are **James R. Seale**, **Kim Oliver Ward** and **Melinda M. Waters**, all of Montgomery; **Kenneth C. Randall** of Tuscaloosa; and **Victor H. Lott, Jr.** of Mobile.

Seale is in private practice in Montgomery with the firm of Robison & Belser and is president of the board of trustees of the Alabama Law Foundation, Inc. Through his work with the Foundation, he has assisted the VLP in focusing on its mission of assisting individuals.

Ward is the director of the state bar's Mandatory Continuing Legal Education Department. She served as the second director of the VLP, from August 1995 through December 1998, during which time the program was expanded into every county in the state.

Waters is the executive director of Legal Services Corporation of Alabama. She was director of the Volunteer Lawyers Program from its inception in 1991 through 1995 and continues to work with the VLP in the referral of clients and through her work on the bar's Access to Legal Services Committee, the oversight committee of the VLP.

Melinda Waters (left) receives her award from VLP Director Linda Lund.

Randall is the dean of the University of Alabama School of Law. He has provided untold support to the VLP, not only this year but over the past several years, encouraging University staff and student participation in the VLP.

Lott is in private practice with the firm of Adams & Reese of Mobile. He recently completed his term as president of the state bar, during which time he championed the access to justice issue.

The ASB Volunteer Lawyers Program provides thousands of hours of free legal assistance to hundreds of indigent Alabama citizens each year. Program volunteers provide access to the justice system which would otherwise be unavailable. ■

Kim Oliver Ward, ASB CLE director and former VLP director, another Pro Bono Award recipient

Litigation Cost Controls and the Professional Obligations of Insurance Defense Lawyers

By Susan Randall

The Disciplinary Commission of the Alabama State Bar recently issued a formal opinion, Opinion Number RO-98-02 (reported in *The Alabama Lawyer*, January 1999), addressing the ethical propriety of cost-cutting measures imposed by insurance companies on attorneys retained to represent their insureds under liability policies. Over the last decade, an increasing percentage of liability insurance payments, as much as 40 percent by some measures, is attributable to defense costs. In response to rising costs, insurance companies have instituted various cost-containment strategies. Some companies require attorneys representing their insureds to submit detailed client bills to third-party billing review companies for approval. Insurance companies have also imposed limitations on insurance defense litigation, including "management" of litigation by non-lawyer claims adjusters who evaluate liability and damages, participate in settlement, and make recommendations (and in some instances, final decisions) concerning preparation and trial; restrictions on discovery and use of experts; and pre-approval of travel, litigation staffing, and any research exceeding three hours.

In reviewing these cost-cutting measures, the Disciplinary Commission opined that a lawyer should not permit the insurance company to interfere with his or her independent professional judgment in rendering legal services to an insured. Adherence to litigation management guidelines which have that effect constitutes a violation of the lawyer's professional obligations under the Alabama Rules of Professional Conduct. Some cost control initiatives are thus permitted by the professional rules: the insured is entitled to a defense informed by the lawyer's independent professional judgment–but not to the most expensive defense possible. With regard to third-party audits of attorney bills, the Disciplinary Commission further opined that a lawyer should not disclose such information if disclosure could constitute a waiver of client confidentiality or the attorney-client or work product privileges.

These conclusions are basically correct, but the opinion does not provide a complete analysis of the potential problems arising from insurance company use of third party audits or litigation management guidelines, and so provides only limited guidance for many lawyers attempting to assess their professional obligations in insurance defense. The primary problem with the opinion is its premise that only the insured is a client in an insurance defense. In many instances, this is simply not true. In every instance, the insured is a client; in the absence of a conflict of interest, however, both the insurance company and the insured are clients. The Alabama Rules of Professional Conduct and Alabama case law recognize that both insurance company and insured are clients in the typical case. Comments to the Alabama Rules of Professional Conduct 1.8(f) explicitly state that both insured and insurer are clients in the normal case. Alabama case law similarly holds that an insurance defense typically involves a dual representation. See *Mitchum v. Hudgens*, 533 So.2d 194, 198 (Ala. 1988); *L & S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Insurance Co.*, 521 So.2d 1298 (Ala. 1987). Only where there is an actual conflict of interest does the insurance company lose its client status under Alabama law. Further, recognition of the insurance company as a client accords with the realities of the contractual relationship of insurer and insured. Standard liability policies provide that the insurer has both a "right and duty" to defend its insured and that the insurer has "discretion" to settle suits against its insured. In short, by permitting the insurer to exercise substantial control over litigation against its insured, the insurance contract itself suggests that the insurer is a client.

This article will examine the Disciplinary Commission's analysis and expand upon it in an attempt to offer further guidance to lawyers faced with cost-control mandates imposed by insurance companies.

Litigation Management Guidelines

The Disciplinary Commission limits its analysis of the professional ethical issues presented by insurance company cost-control measures to instances in which a conflict of interest in insurance defense renders the insured the only or the primary client. Under the one-client view of the insurance defense relationship articulated by Disciplinary Commission, Alabama Rules of Professional Conduct 1.8, Conflict of Interest: Prohibited Transactions, and 5.4, Professional Independence of a Lawyer, control. These rules restrict the ability of third-party payors to interfere with, direct or regulate

the lawyer's independent professional judgment on behalf of a client. Rule 1.8(f) provides:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) The client consents after consultation or the lawyer is appointed pursuant to an insurance contract;
>
> (2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) Information relating to representation of a client is protected as required by Rule 1.6.

Rule 5.4(c) provides:

> A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Where there is a conflict of interest between the insurance company and its insured, these rules in fact control and the Commission's opinion is correct. A lawyer's adherence to insurer-imposed litigation management guidelines may interfere with the lawyer's independent professional judgment on behalf of his or her only client, the insured, in violation of Rule 1.8(f); such guidelines may also constitute an attempt to direct or regulate the lawyer's judgment in violation of Rule 5.4(c). As the Commission concluded,

> An attorney should not allow litigation guidelines, or any other requirement or restriction imposed by the insurer, to in any way impair or influence the independent and unfettered exercise of the attorney's best professional judgment in his or her representation of the insured.

In reality, however, although there is a potential for conflict in all insurance defense relationships, no actual conflicts materialize in many or perhaps most such relationships. Many claims against an insured fall within the substantive coverage provisions of a liability policy as well as the policy's monetary limits, and so dual representation is possible. Rules 1.8(f) and 5.4 (c), relied upon in the Commission's opinion, do not apply to a joint representation where both insured and insurer are clients. Rule 1.8(f) deals with payment of a lawyer by "one other than the client." Although this language conceivably applies to payment of a lawyer by a co-client, the more natural reading contemplates a non-client as third-party payor. The Comments endorse this reading, clarifying that Rule 1.8(f) does not apply to a dual representation of policyholder and insurance company. Specifically, the Comments provide:

> Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Subsection (1) in this paragraph expressly recognizes that in the insurance defense practice, attorneys are appointed by insurers to represent insureds as clients. The insurer's authority to appoint counsel springs from its contract with the insured. In the normal insurance defense relationship where, for example, there are no coverage issues, appointed counsel has two clients, the insured and the insurer. *Hence, the insurer is not a third party.*

(emphasis added).

The Comments to Rule 1.7 indirectly buttress this conclusion, citing as an example of a situation to which 1.8(f) applies, an insurance defense in which "an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer provides special counsel for the insured."

Similarly, Rule 5.4(c) does not apply where both insurer and insured are clients. It also deals with the situation in which a person "recommends, employs, or pays" a lawyer to render legal services for another. In such cases, the person who pays for the representation cannot interfere with the lawyer's independence and exercise of professional judgment on behalf of the client. Again, the most natural reading of the provision suggests that it applies to non-clients who pay for legal services for others, and not to a co-client in a dual representation.

In a dual client representation, different rules apply and the analysis of a lawyer's professional obligations is more complicated. Most centrally, a lawyer's client, whether singly or jointly represented, has the right to determine the scope of the lawyer's representation under Rule 1.2, Scope of Representation. Rule 1.2(a) requires the lawyer to permit the client to make important decisions concerning the representation:

> A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. . . .

Rule 1.2 (c) additionally allows a lawyer to limit the objectives of a representation, providing: "A lawyer may limit the objectives of the representation if the client consents after consultation." The Comments elaborate:

> **Scope of Representation** Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred. . . .
>
> **Services Limited in Objectives or Means** The objectives of scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. . . .The terms upon which representation is undertaken may exclude specific objectives or means.

These Rules and Comments make it clear that a client has the right to determine how much the client is willing to spend in defending a litigation, consistent with cost-cutting strategies contained in insurance company litigation management guidelines. As applied to a dual representation, Rule 1.2 and the quoted portions of the Comments indicate that a client, the insurance company in this context, may impose various cost controls on a lawyer's representation of its co-client insured.

Any such restrictions on the objectives of a dual insurance defense representation, however, must meet two criteria. First, the insured co-client must consent to the limitation of objectives after consultation, under Rule 1.2 (c). Second, any limitation must be consistent with the lawyer's professional obligations.

The insured's consent to a limited representation, as required by Rule 1.2 (c), cannot be assumed based upon the insurance contract. As a matter of contract, the insured cedes to the insurance company the basic rights afforded to clients under Rule 1.2: the insurance contract gives the insurer substantial rights in controlling litigation against its insured, including the right to choose defense counsel, to require the insured to cooperate in the defense, and to make decisions about settlement. However, the insured's assent to the insurance contract does not constitute consent, under the Rules of Professional Conduct, to a defense restricted in various ways. Even an insured who carefully read the policy would not likely understand that the nature of the insurance defense relationship, and the insurance company's control over the defense. The policy certainly does not alert a reader to the possibility of specific limitations on the defense contained in litigation management guidelines. Further, even if the insurance contract were clear on these points, the insurance defense lawyer's independent obligation to consult with the insured and obtain the insured's consent under Rule 1.2 (c) remains. At a minimum, the lawyer must disclose to the insured the limited nature of the representation (that the lawyer's objective is only to defeat or minimize the claim against the insured) and that fact that it is a joint representation; explain the insurer's rights to control the defense in accordance with the insurance contract; and communicate the basic advantages and disadvantages of the dual representation. Most insureds are likely to consent; a refusal would require the insured to retain counsel at his or her own expense.

Second, the limited representation must be consistent with the insurance defense lawyer's professional obligations, specifically, the obligations of competence, set out in Rule 1.1, and diligence, set out in Rule 1.3, which must be observed with regard to both clients. The Comments to Rule 1.2 explicitly state that not all limitations on the scope of representation are permissible:

> An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [Competence], or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

If the lawyer can provide a diligent, competent defense to the insured consistent with insurer-imposed cost controls, then no ethical problems arise. However, if insurer-imposed cost controls impair the defense lawyer's ability to provide the insured with a competent, diligent representation, a conflict of interest between the two clients arises and Rule 1.7, Conflict of Interest, applies. Specifically, Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

A literal reading of the language "may be materially limited" suggests that an insured's informed consent to the joint representation under Rule 1.7 (b) would be required in every case, since all dual representations entail possible conflicts of interest. It seems clear, however, despite the language of the rule, that informed consent should not be required with regard to every theoretically possible conflict. Presumably, the rule is triggered only if there is a substantial risk that potential conflicts will materialize. In such cases, the lawyer must assess the effect of the potential conflict on the representation. If the lawyer reasonably believes that the representation will not be adversely affected under (b)(1), the lawyer may seek the insured's consent to the representation under (b)(2). If the lawyer believes that the conflict will adversely affect the representation, the lawyer may not seek the insured's consent under (b)(2); the insured may not waive the conflict.

If the conflict or likely conflict is not waivable, or if the insured refuses to waive it, the lawyer cannot ethically continue the joint representation. Whether the lawyer may continue to represent any of the clients under these circumstances is determined by Rule 1.9, Conflict of Interest: Former Client, according to the Comments to Rule 1.7. Rule 1.9 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter: (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation.

As applied to insurance defense, Rule 1.9 should be read to require the lawyer to obtain the insurance company's consent to the lawyer's continued representation of the insured after a conflict has arisen. This conclusion is consistent with the case law in Alabama, and in the majority of other jurisdictions, which holds that a lawyer retained by the insurance company represents only the insured where there is a conflict of interest. The insurance company is likely to consent, since it is contractually obligated to provide its insured with a defense and substituting new counsel for counsel already familiar with the case will clearly add to its costs.

In most instances, however, conflicts stemming from insurance company strategies to control defense costs will not materialize. If an insurance company's restrictions would prevent a lawyer from adequately representing the insured in a particular case, the lawyer should so inform the insurance company. Several considerations favor the company's acquiescence to necessary defense costs. First, it is generally in the insurance company's interests to obtain a defense judgment or to minimize a plaintiff's judgment, and counsel's determination that particular measures are necessary to do so will likely carry sig-

nificant weight. Second, any restriction which would prevent adequate representation creates a non-waivable conflict of interest under Rule 1.7(b)(1), which in turn precludes the joint representation of insurance company and insured. Although this precise situation has not been litigated in Alabama, the logic of the Alabama case law suggests that the insurance company would be required to use separate counsel to protect its interests, with attendant expenses; the cost of separate representation for insurer and insured would almost certainly exceed the cost of the disputed defense measures. Third, an insurance company is contractually obligated to provide a defense for its insured, and failure to provide an adequate defense may subject it to liability for breach of contract. In extreme cases, an insurance company's insistence on adherence to unreasonable cost-control measures may subject it to liability for bad faith, with the potential for an award of punitive damages in favor of the insured. Such claims would likely be adjudicated along the same lines as cases involving the insurer's failure to settle a claim within policy limits. In one such case, the Alabama Supreme Court, citing Appleman, *Insurance Law and Practice*, Section 4712, articulated a test for bad faith which could be applied in this context as well:

> The question is always: Did the insurer exercise that degree of skill, judgment, and consideration for the welfare of the insured which it, as a skilled professional defender of lawsuits having sole charge of the investigation, settlement, and trial of the suit, may have been expected to utilize?

State Farm Mutual Automobile Insurance Co. v. Hollis, 554 So.2d 387, 391 (Ala. 1989).

In short, litigation management guidelines are much more likely to create professional ethical problems in a single client representation than in a dual representation. A lawyer who represents only the insured is obligated, under Rules 1.8(f) and 5.4(c), to exercise independent professional judgment on behalf of the insured. The lawyer's professional independence is directly and unavoidably challenged each time a non-client insurance company attempts to control or restrict the litigation against the insured. Where the governing professional obligation is independence of professional judgment, the very nature of litigation management guidelines raises an ethical issue. In contrast, in a dual representation, co-clients share the lawyer's services; the lawyer exercises professional judgment on behalf of both clients. Accordingly, the lawyer's independence and the client insurance company's control over the representation are not the central ethical concerns. Rather, the ethical analysis centers on adequacy of the representation and issues of the insured client's consent. The insurance company, as a client, may impose restrictions on the representation or control the litigation in various ways, as long as the co-client insured consents after disclosure and the resulting representation is adequate under Rules 1.1 and 1.3. Thus, a lawyer's adherence to litigation management guidelines may be entirely consistent with the professional obligations of competence, diligence and disclosure required in a dual representation of insurer and insured, but is always questionable in a single representation, where Rules of Professional Conduct require the lawyer's exercise of professional judgment on behalf of the insured, independent of the non-client insurer.

Third-Party Audits

With regard to third-party audits of an insurance defense lawyer's bills, the Disciplinary Commission concluded that:

> [A] lawyer should not permit the disclosure of information relating to the representation to a third party, such as a billing auditor, if there is a possibility that waiver of confidentiality, the attorney-client privilege or the work product privilege would occur.

In reaching its conclusion, the Commission relied on Alabama Rules of Professional Conduct 1.6, Confidentiality of Information, and 1.8(f)(3), Conflict of Interest: Prohibited Transactions, which respectively provide:

> A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation.

A lawyer shall not accept compensation for representing a client from one other than the client unless: information relating to representation of a client is protected as required by Rule 1.6.

As noted in the discussion of litigation management guidelines, Rule 1.8(f) applies only where there is a conflict of interest between the insurance company and its insured. Regardless, since Rule 1.8(f)(3) refers to Rule 1.6, that rule sets out the insurance defense lawyer's obligations.

It is clear that billing statements fall within the broadly-worded prescription of Rule 1.6(a). Such statements constitute "information relating to representation of a client," disclosure of which breaches the obligation of confidentiality. Neither of the exceptions indicated in 1.6(a) apply. Insurance contracts contain no implicit or explicit consent to breaches of the insured client's right to confidentiality. Disclosures of billing information to a third party are not "impliedly authorized in order to carry out the representation," unlike, for example, an admission of a fact that cannot be disputed in the course of litigation, information provided in response to valid discovery requests, or necessary disclosure of information in the course of negotiations. If anything, the opinion is not stated strongly enough. The harm to the client is the disclosure itself, and not the possibility of waiver. Any disclosure constitutes a breach of confidentiality in contravention of Rule 1.6(a), regardless of the possibility of waiver of the attorney-client or work product privileges. The duty of confidentiality is broader than the attorney-client and work product privileges, and breaches of the duty affect and may harm the client even if the privileges are not implicated. ■

Susan Randall
Professor Susan Randall teaches insurance law at the University of Alabama School of Law. She received her J.D. from Columbia University in 1982 and has been a member of the law school faculty since 1992.

Why a Women's Section?

By Caryl P. Privett

Why has the Alabama State Bar Board of Bar Commissioners created a Women's Section?

In April 1998, the Committee on Women in the Profession hosted a retreat to consider the concerns of women lawyers in Alabama. This retreat focused on matters raised by a survey of women lawyers carried out by the committee in 1996-97, under the leadership of Celia Collins of Mobile. Women lawyers and judges from each county in the state and representatives of law schools in the state were invited. It was a consensus of those attending the retreat that the greatest need for women practitioners was the creation of a women's section of the state bar.

Following the circulation of petitions and a report and recommendation from the committee, the Board of Bar Commissioners established the section in December 1998.

Background

Beginning in October 1993 with the Task Force on Women in the Profession, appointed by then-state bar President Spud Seale, and followed in October 1995 by the Board of Bar Commissioners' creation of the Committee on Women in the Profession, the ASB has been studying the status of women lawyers in Alabama.

At the April 1998 retreat, members of the Committee on Women in the Profession considered a number of options, including continuing the committee structure, creating a separate bar association, and organizing a new section.

Options

The committee structure contained several limitations. The members and the chairperson of the Committee on Women in the Profession were appointed annually by the president of the state bar. Membership on the committee was limited as was the mission and the budget. Finally, the role of the committee was perceived as somewhat limited: surveying and studying the role and status of women in the legal profession, serving in an advisory capacity to other committees, and making recommendations to the Board of Bar Commissioners.

Another option was organizing a separate women's bar association. There are two nationwide women's bar association: the National Association of Women Lawyers and the National Conference of Women's Bar Associations. There are separate women's bar associations in many states and numerous metropolitan areas throughout the United States. Both the Women Lawyers Section of the Birmingham Bar Association and the Committee on Women in the Profession have participated in the activities of the National Conference of Women's Bar Associations.

African-American lawyers in Alabama have an active statewide association, the Alabama Lawyers Association, and an active association in Birmingham, the Magic City Bar Association. The latter has a representative on the Executive Committee of the Birmingham Bar Association.

After reviewing the options, the attendees at the April 1998 retreat proposed the creation of a section. Creating a section means creating a membership group. The section is open to all members of the Alabama State Bar, not a select group of under 50 people. (As of this writing, there are approximately 70 members of the section, with new members joining weekly.) Creating a section means developing programs, committees, membership and a financial base. A committee uses funds from the state bar; a section has its own funds. The members of the committee believed that the needs of women lawyers in Alabama could most appropriately be addressed by working within the state bar rather than by establishing a separate organization.

Issues

The most significant issue for women practitioners in Alabama, based upon the 1996-97 survey and the 1998 retreat, is how to "network" with other women lawyers. This is particularly true for women who practice primarily outside the metropolitan areas of the state.

In addition to networking, the creation of a section would provide the opportunity for women to more fully participate in bar activities. This belief is based upon observing the activities of the Young Lawyers' Section and the experience of the Women Lawyers Section of the Birmingham Bar.

By presenting programs, some in conjunction with state bar programs or other sections and committees, the Women's Section hopes to broaden the resources and learning opportunities, not only for women lawyers, but also for all members of the bar.

Opportunities

The Women's Section of the Alabama State Bar offers new opportunities for women lawyers in the state to participate in the activities of the bar, to interact with each other and to enhance their practices.

Members of the Executive Committee, attendees of the Women's Section's first annual meeting in May, and charter section members are currently working to develop means to communicate effectively among the membership, as well as ideas for new programs and projects. Anyone who is interested in joining the section is invited to send $20 for dues to the Women's Section, 115 Office Park Drive, Suite 320, Birmingham 35223. ■

Caryl P. Privett, of Birmingham, is the current chair of the ASB Women's Section.

Opinions of the General Counsel

By J. Anthony McLain, general counsel

Law Firm Name- The Name of a Law Firm May Not Contain the Names of Members of the Law Firm Who Are Not Partners

J. Anthony McLain

Under old DR 1-102(C), a lawyer could not hold himself out as having a partnership unless the lawyers were, in fact, partners. Rule 7.5 of the current Alabama Rules of Professional Conduct did not expressly prohibit the false implication in advertising that a partnership existed.

Question:

With the current rule in mind, can the name of a law firm contain the names of members of the firm who may not be partners?

Alternatively, can the name of a law firm contain the names of members who are compensated by a percentage of their gross income produced for the firm rather than by strict salary?

Answer:

The name of a law firm may not contain the names of members of the law firm who are not partners. However, the name of the law firm may contain the names of members who are compensated by a percentage of their gross income produced for the firm rather than by strict salary, if they are partners.

Discussion:

Rule 7.1(a), Alabama Rules of Professional Conduct, states:

> "A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

Rule 7.5(a), A.R.P.C., states, in part, that:

> "A lawyer shall not use a firm name letterhead, or other professional designation that violates Rule 7.1."

While Alabama did not adopt the provisions of Model Rule 7.5(d) which expressly prohibited the false implication in advertising that a partnership or organization of lawyers existed, prior opinions of the Disciplinary Commission have effectuated just such a prohibition. Further, the language of Model Rule 7.5(d) seems to be superfluous since any misleading designation would be prohibited either by Rule 7.1 or 7.5(a).

In Ethics Opinion 391, the Disciplinary Commission held that three attorneys who were not partners in the classical sense, i.e., sharing in fees billed to the firm's clients and also sharing in responsibility and liability, could not use their last names as a firm name since the same would be misleading and therefore unethical.

In RO-82-564, the Disciplinary Commission held that an attorney and an associate who had not been admitted to the Alabama State Bar could not ethically open a bank account in the name of "A and B, Attorneys." The Commission reasoned that while the proposed style of the bank account would be circulated to and observed by a limited segment of the public and thus not be as deceptive to the general public as would a letterhead or professional announcement, it would still be deceptive and misleading.

In RO-86-61, the Disciplinary Commission held that the use of an associate's name in the firm name, letterhead, billing, etc., was impermissible since the lawyer and associate were not entering into a formal partnership, financial or otherwise, thus making use of the firm name (including the associate's name) deceptive and misleading to the public. The Commission qualified its holding by stating that if the lawyer and the associate were entering into arrangements where there would not be

a partnership in the traditional classical sense, the associate's name could appear upon the letterhead, but not in the firm name. The South Carolina Bar, in Opinion 86-12, held that a firm may not use an associate's name in the firm name because the relationship is not a partnership and could mislead the public.

Discussion of this issue should also include some mention of the use of trade names by a firm. Former EC 2-11 stated that:

> "The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under his own name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such.
>
> "For many years, some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public."

Further, Rule 7.5(a), A.R.P.C., states, in part:

> "A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable organization and is not otherwise in violation of Rule 7.1 or Rule 7.4."

The Comment to Rule 7.5 shows the continuation of the policy of allowing the use of the name of a deceased partner in the firm name since such would constitute a trade name.

Interpretation of Rule 7.5 also recognizes that many traditional law firms bear the names not only of deceased partners, but of former partners, not deceased, who are retired, "of counsel" or may have relinquished their position as a partner in the firm but are still a firm member. The continued use of this traditional name is obviously not misleading under such circumstances, and in no way violates the true spirit of the intent of Rule 7.5.

Lawyers should take care to be clear about the organization or entity of which their practice consists. The danger to be avoided is the possible misleading or deceiving of the general public as to the identity, status and responsibility of lawyers within the firm.

The situation proposed in the alternative question would likewise be governed by the above reasoning and authorities. [RO-91-04] ■

DISCIPLINARY NOTICES

Notices

- Notice is hereby given to **Kenneth Coy Sheets, Jr.**, formerly of Dothan, that he must respond to the formal charges in Disciplinary files ASB 98-112(A), 98-113(A), 98-157(A), and 99-061(A) within 28 days from the date of this publication, September 15, 1999. Failure to respond shall result in further action by the Office of General Counsel and/or a default judgment to be entered against him.
- Notice is hereby given to **Phillip Eugene Kinney**, who practiced law in Montgomery, and whose whereabouts are unknown, that pursuant to an Order to Show Cause of the Disciplinary Commission of the Alabama State Bar, dated May 19, 1999, he has 60 days from the date of this publication (September 15, 1999) to come into compliance with the Client Security Fund assessment requirement for 1999. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of his license. [CSF 99-4]
- Notice is hereby given to **William Clayton Wallace**, who practiced law in Gulf Shores, Alabama and whose whereabouts are unknown, that pursuant to an Order to Show Cause of the Disciplinary Commission of the Alabama State Bar, dated July 19, 1999, he has 60 days from the date of this publication (September 15, 1999) to come into compliance with the Mandatory Continuing Legal Education requirements for 1998. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 99-31]
- Notice is hereby given to **Joan Charlene McLendon**, who practiced law in Conway, Arkansas and whose whereabouts are unknown, that pursuant to an Order to Show Cause of the Disciplinary Commission of the Alabama State Bar, dated May 19, 1999, she has 60 days from the date of this publication (September 15, 1999) to come into compliance with the Client Security Fund assessment requirement for 1999. Noncompliance with the Client Security Fund assessment requirement shall result in a suspension of her license. [CSF 99-5]
- Notice is hereby given to **Joan Charlene McLendon**, who practiced law in Conway, Arkansas, and whose whereabouts are unknown, that pursuant to an Order to Show Cause of the Disciplinary Commission of the Alabama State Bar, dated July 19, 1999, she has 60 days from the date of this publication (September 15, 1999) to come into compliance with the Mandatory Continuing Legal Education requirements for 1998. Noncompliance with the MCLE requirements shall result in a suspension of her license [CLE 99-22]
- Notice is hereby given to **Greg Fonatine Jones**, who practiced law in Lillian, Alabama and whose whereabouts are unknown, that pursuant to an Order to Show Cause of the Disciplinary Commission of the Alabama State Bar, dated July 19, 1999, he has 60 days from the date of this publication (September 15, 1999) to come into compliance with the Mandatory Continuing Legal Education requirements for 1998. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE 99-17]

Reinstatements

- Birmingham attorney **James Edmund Odum, Jr.** was reinstated to the practice of law in the State of Alabama by order of the Alabama Supreme Court, effective July 16, 1999. [ASB Pet. No. 99-03]
- Guntersville attorney **John Wallace Starnes** was reinstated to the active practice of law by order of the Alabama Supreme Court effective June 23, 1999. [ASB Pet. No. 99-04]

Disbarments

- **James Cannon, Jr.** of Detroit, Michigan was disbarred from the practice of law in the State of Alabama by order of the supreme court effective May 28, 1999. The respondent attorney advised his client that he had settled his case and obtained a judgment in his favor in the amount of $3,500. The respondent attorney promised to forward the net proceeds to the client, but failed to do so. All efforts by the client to communicate with the respondent attorney were unsuccessful. The client filed a grievance with the bar, but the respondent attorney failed or refused to respond to repeated requests for information by the Office of General Counsel. The respondent attorney's failure to cooperate resulted in the filing of formal charges. After service by publication, a default judgment was entered against the respondent attorney. The respondent attorney was found to have violated Rules 8.1(b) [bar admission and disciplinary matters] and 8.4 (a) (c) (d) and (g) [misconduct]. [ASB No. 97-304]
- Pelham attorney **William F. Mathews** was disbarred from the practice of law in the State of Alabama by order of the Supreme Court effective May 28, 1999. The respondent attorney was retained by a client to represent her and her daughter in related

criminal and juvenile proceedings. The client paid the respondent attorney $2,200. Thereafter, the respondent attorney disappeared, abandoning his clients. The client filed a grievance with the bar, but the respondent attorney failed or refused to respond to repeated requests for information by the Office of General Counsel, The respondent attorney's failure to cooperate resulted in the filing of formal charges. After service by publication, a default judgment was entered against the respondent attorney. The respondent attorney failed to appear for the hearing to determine discipline. The respondent attorney was found to have violated Rules 1.3 [diligence], 1.4(a) [communication], 1.16(d) [declining or terminating representation], 8.1(b) [bar admission and disciplinary matters] and 8.4 (a) (c) and (g) [misconduct]. [ASB No. 97-344]

- On June 4, 1999, the Alabama Supreme Court disbarred Enterprise attorney **Daniel F. Carmichael, Jr.** from the practice of law. This action was in conjunction with the Disciplinary Board of the Alabama State Bar. The bar's disciplinary rules allow a lawyer who is the subject of an investigation or proceeding involving misconduct to surrender his law license. The bar has been investigating complaints against Mr. Carmichael concerning his issuance of "insufficient funds" checks from his attorney's trust account. An analysis of the trust account records was performed by the bar's office of general counsel. This revealed that Mr. Carmichael had been using trust funds to pay various personal expenses. Mr. Carmichael and his attorney met with the bar on May 29, 1999, and Mr. Carmichael signed the consent to disbarment at that time.

Suspensions

- Effective February 9, 1999, attorney **Omar Mark Zamora** of Phenix City has been suspended from the practice of law in the State of Alabama for noncompliance with the 1997 Mandatory Continuing Legal Education Rules of the Alabama State Bar. [CLE 98-41]
- Huntsville attorney **Sheila Kay Facemire** was suspended from the practice of law in the State of Alabama for a period of 91 days effective May 29, 1999. The suspension was based upon the respondent attorney's plea of guilty to violating Rules 1.3, 1.4, and 8.1(b), *Alabama Rules of Professional Conduct*. Ms. Facemire was retained in six separate matters to represent clients in various legal matters which included matters involving estate and probate, workers' compensation, wrongful termination and retaliatory discharge. Her representation in these matters began as early as 1993 and continued through 1996 and 1997. During this time, Ms. Facemire admitted to doing little to no work in any of these matters and further admitted to failing or refusing to communicate with her clients regarding their cases. In two of these cases, when grievances were filed with the Alabama State Bar, Ms. Facemire failed or refused to respond to numerous requests for information regarding the grievances from both the Office of General Counsel of the Alabama State Bar and the Huntsville-Madison County Bar Association local grievance committee. Based upon Ms. Facemire's plea of guilty, she was ordered to receive a 91-day suspension which was to be held in abeyance pending successful completion of her probation. While on probation, Ms. Facemire admitted to violating the terms of her probation. Therefore, her probation was revoked and the 91-day suspension which was being held in abeyance was placed in effect. [ASB Nos. 95-347, 97-298, 97-352, 98-108, 98-158, & 98-275]
- **Brenda W. Hardison** was suspended from the practice of law in the State of Alabama for a period of 60 days effective June 2, 1999, for violating Rules 2.1 [Advisor], 4.1(a) [truthfulness in statements to others] and 8.4(a) and (g) [misconduct], *Alabama Rules of Professional Conduct*.

  While employed with Legal Services Corporation of Alabama, the respondent attorney, as well as other attorneys, had represented Willie Marshall and Lynette Marshall in various legal matters. During the course of the respondent attorney's representation of the Marshalls, she engaged in an adulterous relationship with Willie Marshall. This relationship, combined with other factors, eventually lead to a breakdown of the marriage and the Marshalls were divorced by decree of the Circuit Court of Baldwin County on March 23, 1994. The decree of divorce awarded Mrs. Marshall and her children the marital residence and ordered that her ex-husband, Willie Marshall, continue to make the mortgage payments. Subsequent to this order, Mr. Marshall failed to pay the mortgage payments as ordered and the house was eventually placed in foreclosure. Mrs. Marshall was able to make arrangements to bring the mortgage payment arrearage up to date and stop the foreclosure. However, the respondent attorney intervened on behalf of Willie Marshall and advised the attorney representing the mortgage company that Mr. Marshall was the mortgagor, and that it was his desire for the foreclosure to proceed. Thereafter, the respondent attorney and Mr. Marshall arranged to have a "straw man" purchase the house at the foreclosure sale with an

understanding that Mr. Marshall would then buy back the residence from the straw man, thus circumventing the court's order entered in the divorce proceeding. [ASB No. 97-175]

Public Reprimands

- Birmingham attorney **Scott Johnson Humphrey** received a public reprimand without general publication on May 21, 1999 for having violated Rules 1.3, 1.5(a), 1.5(b), and 1.5(c), *Alabama Rules of Professional Conduct.*

  During 1993 and 1994, he was a partner in the firm of Stewart, Davis & Humphrey, P.C. The firm acted as a closing agent for more than 2,000 real estate closings. The settlement statements in a substantial number of these closings reported erroneous amounts for "government recording and transfer charges." Individually, these errors only resulted in nominal overcharges or undercharges to the parties to the real estate transaction. However, collectively, the errors resulted in an accumulation of a substantial surplus of funds within the firm's recording trust account with the settlement statements or monthly bank statements.

  Upon discovery of the surplus funds in the recording trust account, rather than conducting an investigation to determine the cause, respondent attorney and other members in his firm transferred or allowed these funds to be transferred to the firm's operating account and commingled with the attorney with attorney funds. Additionally, there was evidence that the recording trust account was used or allowed to be used to pay firm expenses.

  The Disciplinary Commission, in its deposition of this matter, considered that respondent attorney had no prior disciplinary history and there was no evidence of intentional misconduct. The Disciplinary Commission ordered that the respondent attorney receive a 90-day suspension, the imposition of said suspension being conditioned on successful completion of a two-year probationary period. Other conditions of probation were ordered, including a condition that respondent attorney and his co-respondents make restitution in the amount of $31,000 as directed by the Disciplinary Commission. [ASB No. 95-207(B)]

- Birmingham attorney **Stephen Kent Stewart** received a public reprimand without general publication on May 21, 1999 for having violated Rules 1.3, 1.5(a), 1.5(b) and 1.5(c), *Alabama Rules of Professional Conduct.*

  During 1993 and 1994, he was a partner in the firm of Stewart, Davis & Humphrey, P.C. The firm acted as a closing agent for more than 2,000 real estate closings. The settlement statements in a substantial number of these closings reported erroneous amounts for "government recording and transfer charges." Individually, these errors only resulted in nominal overcharges or undercharges to the parties to the real estate transaction. However, collectively, the errors resulted in an accumulation of a substantial surplus of funds within the firm's recording trust account with the settlement statements or monthly bank statements.

  Upon discovery of the surplus funds in the recording trust account, rather than conducting an investigation to determine the cause, respondent attorney and other members in his firm transferred or allowed these funds to be transferred to the firm's operating account and commingled with the attorney with attorney funds. Additionally, there was evidence that the recording trust account was used or allowed to be used to pay firm expenses.

  The Disciplinary Commission, in its deposition of this matter, considered that respondent attorney had no prior disciplinary history and there was no evidence of intentional misconduct. The Disciplinary Commission ordered that the respondent attorney receive a 90-day suspension, the imposition of said suspension being suspended condi-

tioned on successful completion of a two-year probationary period. Other conditions of probation were ordered, including a condition that respondent attorney and his co-respondents make restitution in the amount of $31,000 as directed by the Disciplinary Commission. [ASB No. 95-207(A)]

- Dothan attorney **Richard Heywood Ramsey, IV** received a public reprimand without general publication on July 14, 1999. Mr. Ramsey was appointed by the Circuit Court of Houston County to represent a criminal defendant. After the client was convicted another attorney was appointed to represent the client on appeal. Despite this fact, Mr. Ramsey accepted $2,000 from the client's wife to handle the appeal. Mr. Ramsey provided little, if any, legal services in connection with the appeal. When the client's wife demanded a refund Mr. Ramsey attempted to justify retaining the fee by claiming to have done work for which he had already billed the State of Alabama in connection with the client's criminal trial. Mr. Ramsey was found to have violated Rule1.5(a) of the Rules of Professional Conduct of the Alabama State Bar which prohibits an attorney from charging a clearly excessive fee, Rule 1.5 (f) which preludes an attorney appointed to represent an indigent criminal from accepting any money in the matter from the defendant or anyone on the defendant's behalf, Rule 8.4(c) which provides that it is misconduct involving dishonesty, fraud, deceit or misrepresentation and Rule 8.4 (g) which provides that it is professional misconduct for a lawyer to engage in conduct that adversely reflects on his fitness to practice law. In addition to the reprimand Mr. Ramsey was ordered to refund $2,000 to his client's wife, which he has done. [ASB No. 98-156(A)]

- Tuscaloosa attorney **Steven Franklin Harrison** received a public reprimand with general publication before the Board of Bar Commissioners of the Alabama State Bar on May 21, 1999. The reprimand was a result of Mr. Harrison's having misappropriated and converted to his own use $4,650 in funds belonging to his former client, Chevron USA. Mr. Harrison repaid the misappropriated funds and voluntarily suspended his practice of law for approximately one year during which time he received counseling and treatment. In addition to the reprimand Mr. Harrison was placed on probation for a period of two years. [ASB No. 98-042(A)]

- On May 21, 1999, Birmingham attorney **David Alfred Reid** received public reprimands without general publication in two separate matters. These reprimands were agreed to in conjunction with a plea agreement. Restitution to the two clients involved was also agreed to in these matters.

  In ASB 96-354(A), Mr. Reid was hired to defend Spiral Industry, Inc. in a lawsuit filed in Tuscaloosa County, Alabama. He was paid a retainer of $10,000. In early 1996, he advised the client that he was closing his office. He referred the case to other counsel to handle. After his withdrawal, he failed to respond to numerous requests for the case file. Spiral's new lawyer had to reconstruct file materials at great expense to the client. Even though he had only represented Spiral for a couple of months, he did not refund any portion of the retainer. He entered a plea to violating Rule 1.16(d).

  In ASB 97-011(A), Mr. Reid began representing Robert B. Steele in a Chapter 12 bankruptcy proceeding in June of 1996. Mr. Steele paid Mr. Reid a retainer of $2,200 which was reported to the Bankruptcy Court. The case developed a number of irregularities and experienced undue delays, which the client blamed on Mr. Reid. Finally, Mr. Steele directed Mr. Reid to dismiss the case on October 15, 1996. After the dismissal of the case, Mr. Steele sought other counsel. He attempted to get his file from Mr. Reid without success. Of the $2,200 retainer paid to Mr. Reid, the Bankruptcy Court only approved fees in the amount of $750. Mr. Reid kept the entire fee, but $1,450 should have been refunded upon dismissal of the case. This also involved a violation of Rule 1.16(d)

- **Richard Terrell Davis** received a public reprimand without general publication on May 21, 1999 for having violated Rules 1.3, 1.5(a), 1.5(b), and 1.5(c), *Alabama Rules of Professional Conduct.*

  During 1993 and 1994, he was a partner in the firm of Stewart, Davis & Humphrey, P.C. The firm acted as a closing agent for more than 2,000 real estate closings. The settlement statements in a substantial number of these closings reported erroneous amounts for "government recording and transfer charges." Individually, these errors only resulted in nominal overcharges or undercharges to the parties to the real estate transaction. However, collectively, the errors resulted in an accumulation of a substantial surplus of funds within the firm's recording trust account with the settlement statements or monthly bank statements.

  Upon discovery of the surplus funds in the recording trust account, rather than conducting an investigation to determine the cause, respondent attorney and other members in his firm transferred or allowed these funds to be transferred to the firm's operating account and commingled with the attorney funds. Additionally, there was evidence that the recording trust account was used or allowed to be used to pay firm expenses.

  The Disciplinary Commission considered that respondent attorney had no prior disciplinary history and there was no evidence of intentional misconduct. The Disciplinary Commission ordered that the respondent attorney receive a 90-day suspension, the imposition of said suspension being conditioned on successful completion of a two-year probationary period. Other conditions of probation were ordered, including a condition that respondent attorney and his co-respondents make restitution in the amount of $31,000 as directed by the Disciplinary Commission. [ASB No. 95-207(C)] ■

YOUNG LAWYERS' SECTION

By Gordon G. Armstrong, III, YLS President

The Young Lawyers' Section of the Alabama State Bar is thriving, and I am proud to say that I have been associated with a section that has reached out to so many people. I have now served the bar through my involvement in the YLS since 1991. Yet, while my term as president has come to an end and I am less than one year away from "aging out" as a young lawyer (as that term is defined), I assure you that the fundamental principle of public service is well rooted in the YLS.

There are many worthwhile endeavors and programs sponsored by the YLS, of which all lawyers can be proud. The YLS organizes and runs the admissions ceremony held each spring and fall. **Lisa Van Wagner** of Montgomery chairs this subcommittee and she devotes a significant amount of time and effort in making the ceremony for new admittees a success. It is not easy scheduling a date convenient for the supreme court justices, judges of the courts of civil and criminal appeals, a federal court judge, state bar officers, and a venue for the ceremony, as well. Lisa has accomplished all of this thanklessly over the last several years and deserves your recognition.

The YLS also sponsors a minority participation program. This subcommittee is currently chaired by **La Barron Boone** of Montgomery. The purpose of this program is to open the door to the legal profession as a career choice for minority students. This is accomplished by engaging the assistance of successful minority lawyers and/or judges who participate in a "symposium" for students. It is our belief that by hearing from these successful professionals in the legal field, a positive impact can be made on the students.

Our Youth Judicial Program is a joint project with the YMCA. This program is a mock trial competition for high school students and is extremely popular statewide. The winners of local countywide competition ascend on Montgomery for "finals." The statewide winners then go to a regional multistate competition, and, ultimately, national winners are chosen. The students themselves serve as lawyers, witnesses, judges and jurors.

Another subcommittee of the YLS that has provided invaluable public service is the Disaster Legal Services Committee. This is our "emergency response committee" that is only called upon when FEMA declares a natural disaster in our state. The committee is co-chaired by **Jenelle Evans** of Birmingham and **Kim Calametti** of Mobile, and is "staffed" by volunteer lawyers of the YLS. This aid program offers help with such legal concerns as insurance claims for medical bills; loss of property; drawing up wills and other legal papers lost in a disaster; home repair contracts and contractors; and possible landlord and tenant problems arising from a natural disaster.

The most recognized program sponsored by the YLS is the annual Sandestin Seminar. This CLE opportunity is held each May at the beautiful Sandestin Resort in Sandestin, Florida. This is a tremendously popular seminar, not only because of the "amenities," but because of the programs that are offered and the atmosphere in which it is held. I encourage all lawyers to attend this exciting seminar.

The new officers of the YLS for 1999-2000 were elected at the state bar's annual meeting in July in Birmingham. This year's officers are:

President: Thomas B. Albritton, Andalusia

President-elect: J. Cole Portis, Montgomery

Secretary: Todd S. Strohmeyer, Mobile

Treasurer: Robert Gordon Methvin, Jr., Birmingham

Immediate Past President: Gordon G. Armstrong, III, Mobile

Congratulations to each of the new officers! ■

Federal and State Trial Courts Adopt Standards for Professional Conduct

The judges of the Tenth Judicial Circuit Court of Alabama and the judges of the United States District Court for the Middle District of Alabama recently adopted standards for professional conduct. Both courts acknowledged the assistance of the Alabama Defense Lawyers Association and the Alabama Trial Lawyers Association for coming to the forefront to promote civility and professionalism within the legal profession. The standards adopted are designed to encourage lawyers and judges to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism which are hallmarks of a learned profession dedicated to public service. Copies of the standards adopted by the courts are available from the Clerk of the United States District Court for the Middle District of Alabama in Montgomery and the Clerk of the Tenth Judicial Circuit of Alabama in Birmingham.

TENTH JUDICIAL CIRCUIT OF ALABAMA GENERAL ORDER

STANDARDS FOR PROFESSIONAL CONDUCT

The undersigned judges of the Tenth Judicial Circuit of Alabama have reviewed the attached Standards for Professional Conduct, Lawyer's Duties to the Court and Court's Duties to Lawyers. The Standards and Duties after having been considered were unanimously adopted by the Court on April 8, 1999. The Alabama Defense Lawyers and the Alabama Trial Lawyers Associations are to be praised for encouraging lawyers and judges to promote civility and professionalism within the legal profession. The undersigned judges will make every effort to follow closely the Court's Duties to Lawyers and will expect the lawyers to adhere to the Lawyer's Duties to Other Counsel and Lawyer's Duties to the Court.

The judges request that the Birmingham Bar Association, Bessemer Bar Association and Alabama State Bar send a copy of this Order to all attorneys who practice before this Court.

Done this the 31st day of May, 1999.

J. Scott Vowell
Circuit Judge

Jack D. Carl
Circuit Judge

Edward L. Ramsey
Circuit Judge

Vincent J. Schilleci, Jr.
District Judge

James S. Garrett
Circuit Judge

Gerald R. Topaz
District Judge

William A. Parkson
Circuit Judge

Dan C. King, III
Circuit Judge

Mike McCormick
Presiding Judge, Criminal Division

Teresa B. Petelos
Senior Judge, Bessemer Division

Thomas A. Woodall
Circuit Judge

Eric M. Fancher
District Judge

C. Tommy Nail
Circuit Judge

Ralph Coleman, Jr.
District Judge

Arthur J. Hanes, Jr.
Circuit Judge

Sandra H. Storm
Presiding Judge, Family Court

Wayne Thorn
Presiding Judge

Mac Parsons
Circuit Judge

N. Daniel Rogers, Jr.
Circuit Judge

John H. Alsbrooks, Jr.
District Judge

Allwin E. Horn, III
Circuit Judge

Quendin Brown, Jr.
District Judge

Tennant M. Smallwood, Jr.
Circuit Judge

Donald R. Cruse
District Judge

G. William Noble
Circuit Judge

M. O. Huntley
District Judge

James H. Hard, IV
Circuit Judge

Alfred Bahakel
Circuit Judge

William J. Wynn
Circuit Judge

Robert G. Cahill
District Judge

J. Gary Fates
Presiding Judge, Domestic Division

Gloria Bahakel
Circuit Judge

Orzon L. Johnson
District Judge

John C. Calhoun
Circuit Judge

R. A. Ferguson, Jr.
Circuit Judge

Eugene R. Verin
Circuit Judge

Elise D. Barclay
District Judge

The full text of the Rules is available at the clerk's office of the respective courts or from the programs department of the Alabama State Bar (334-269-1515, x. 304)

THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA GENERAL ORDER

STANDARDS FOR PROFESSIONAL CONDUCT

This court has carefully considered the attached Standards for Professional Conduct which have recently been adopted by the Alabama Trial Lawyers Association and the Alabama Defense Lawyers Association. The Standards have been reviewed and approved by the court's Lawyers Advisory Committee. The court commends the Alabama Defense Lawyers Association and the Alabama Trial Lawyers Association for their efforts to promote and maintain the highest standards of professional conduct and civility among the Bench and Bar, and hereby adopts the attached Standards for Professional Conduct. The judges of this court commit themselves to adherence to the Courts' Duties to Lawyers contained therein, and all lawyers practicing before this court are advised that the Lawyers' Duties to Other Counsel and Lawyers' Duties to the Court are standards which they are expected to observe.

The clerk is Directed to distribute copies of this order and the attached Standards for Professional Conduct to all attorneys presently admitted to practice before this court, and to furnish copies to each attorney admitted to practice in the future at the time of admission.

It Is So Ordered This 8th day of January 1999.

W. HAROLD ALBRITTON
Chief United States District Judge

MYRON H. THOMPSON
United States District Judge

IRA DEMENT
United States District Judge

IMPORTANT!

Licenses/Special Membership Dues for 1999-2000

All licenses to practice law, as well as special memberships, are sold through the Alabama State Bar headquarters.

In mid-September, a dual invoice to be used by both annual license holders and special members will be mailed to every lawyer currently in good standing with the bar.

If you are actively practicing or anticipate practicing law in Alabama between October 1, 1999 and September 30, 2000, please be sure that you purchase an occupational license. Licenses are $250 for the 1999-2000 bar year and payment must be RECEIVED between October 1 and October 31 in order to avoid an automatic 15 percent penalty ($37.50). Second notices will NOT be sent!

An attorney not engaged in the private practice of law in Alabama may pay the special membership fee of $125 to be considered a member in good standing.

Upon receipt of payment, those who purchase a license will be mailed a license and a wallet-size license for identification purposes. Those electing special membership will be sent a wallet-size ID card for both identification and receipt purposes.

If you do not receive an invoice, please notify Diane Locke, membership services director, at 800-354-6154 (in-state WATS) or (334) 269-1515, ext. 136, IMMEDIATELY!

ROAD MAPS
DIRECTIONS FOR THE LEGAL PROFESSION

ALABAMA STATE BAR 1999 ANNUAL MEETING

THE MANY FACES OF THE ALABAMA STATE BAR

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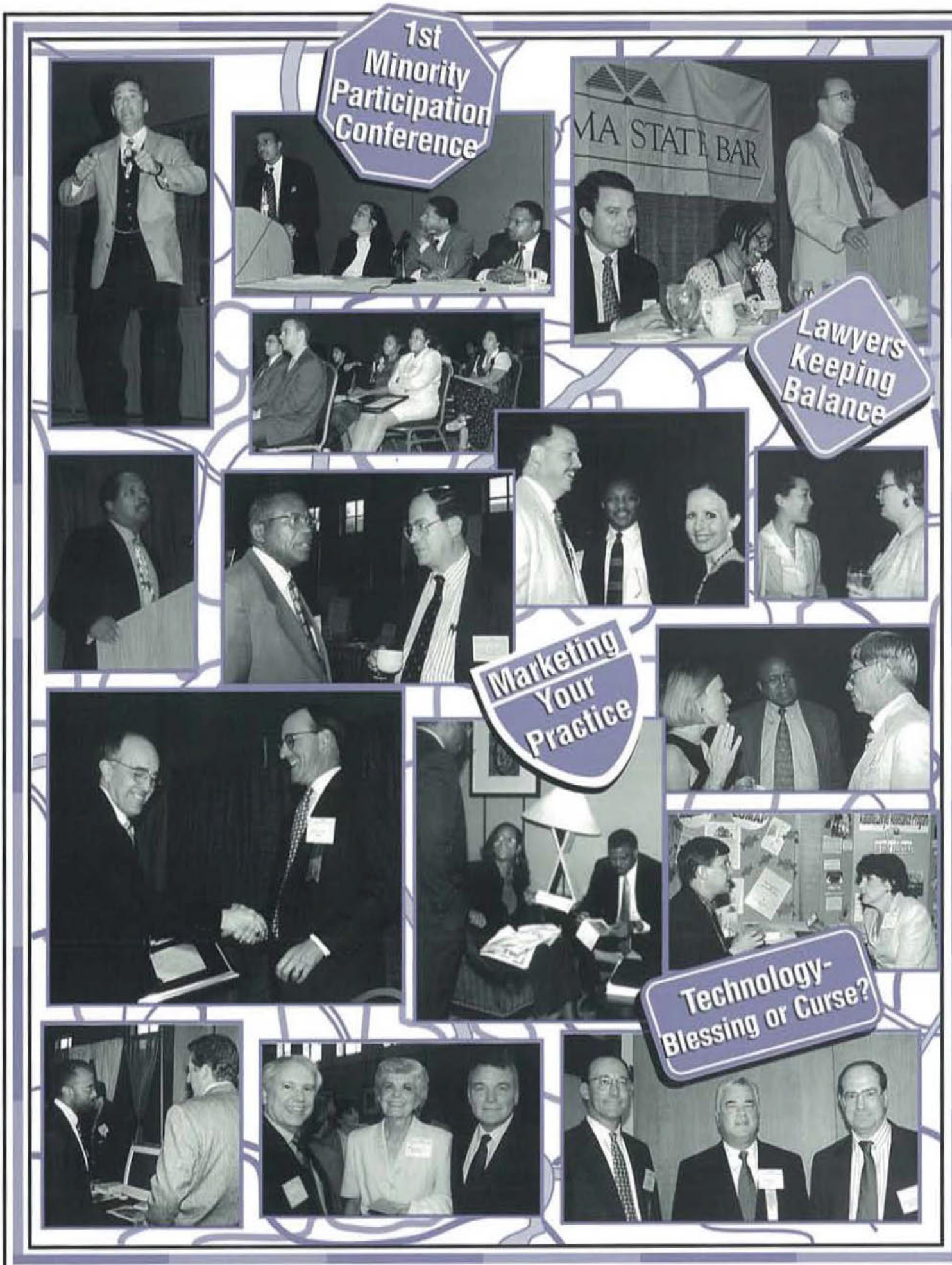
1st Minority Participation Conference
MA STATE BAR
Lawyers Keeping Balance
Marketing Your Practice
Technology- Blessing or Curse?

In Memoriam
Helen S. Freeman
1903–1999

Helen S. Freeman, a longtime employee of the Alabama State Bar, died July 4, 1999. Mrs. Freeman and her husband of 58 years, Ed, had moved from Montgomery, where they had lived for 28 years, to be near their only child, Wanda F. Coffman, and her husband, Norman Coffman, of Sylacauga.

Mrs. Freeman was employed initially as legal secretary to the bar's General Counsel and later served as the Admissions Secretary to the Board of Bar Examiners, the position she held when she retired in October 1977. She was the bar's first employee to retire under the state's retirement system.

RECENT DECISIONS

By Rachel Sanders-Cochran and Wilbur G. Silberman

Recent Civil Decisions

Constitutional Law; Alabama Constitution provides no guarantee of equal protection

***Ex parte Fred Melof*, Ms. 1971900, 1999 WL 339300 (Ala., May 28, 1999).** In this opinion authored by Justice Houston, the Alabama Supreme Court concludes that the Alabama Constitution of 1901 contains no guarantee of equal protection under the laws of this state. The court traced the development of equal protection principles under Alabama law, and noted that delegates at the Constitutional Convention of 1901 specifically refused to carry over into the 1901 Constitution the equal protection provision found in Alabama's 1875 Constitution, with the understanding that everything contained in the deleted provision was covered by the Fourteenth Amendment to the United States Constitution. The *Melof* court found that, until 1977, the Alabama Supreme Court consistently held that Alabama's Constitution provided no guarantee of equal protection. However, the first official recognition of such a guarantee under the 1901 Constitution occurred in 1977, when the Alabama Supreme Court adopted language identical to that found in an erroneous and unofficial annotation printed in the Alabama Code of 1940 and again in the Code of 1975. Noting that the annotation had now been corrected, the court declared that there is no equal protection clause in the Constitution of 1901 and any equal protection guarantee in the State of Alabama must stem solely from the Fourteenth Amendment to the United States Constitution.

Evidence and medical malpractice; Alabama's medical liability act prohibits only plaintiffs from discovering evidence of other acts or omissions; act inapplicable to co-defendants

***Ex parte Pfizer, Inc.*, Ms. 1980155, 1999 WL 357415 (Ala., June 4, 1999).** In this medical malpractice action from Escambia County, the plaintiff filed suit against a physician and others, alleging medical malpractice in connection with a circumcision. In performing the circumcision, the physician used a device manufactured by Pfizer and Valleylab, who were also named as defendants under a products liability claim. During the course of discovery, Pfizer and Valleylab sought to discover evidence of other acts or omissions by the defendant physician. The hospital and physician objected, arguing that Alabama's Medical Liability Act prohibited discovery of these materials. The trial court denied this portion of the manufacturers' discovery requests.

The Alabama Supreme Court granted the manufacturers' petition for writ of mandamus, noting that under Section 6-5-551, a *plaintiff* is prohibited "from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission." Because in this case it was not the plaintiff but a *co-defendant* seeking to discover the information related to other acts or omissions by the physician, the court held that Section 6-5-551 was inapplicable and the records sought were discoverable.

Post-trial review of damages; latest developments regarding emotional distress damages

***Daniels v. East Alabama Paving, Inc.*, Ms. 1970883, 1999 WL 357410 (Ala., June 4, 1999).** In this wrongful death and negligence case from Macon County, the supreme court again addressed the issue of remittitur of jury awards for pain and suffering. However, in this case, the court reversed the trial court's orders remitting seven compensatory damages awards, in amounts primarily representing emotional distress damages. This action arose from a one-car accident involving ten family members. The plaintiffs claimed that the highway on which they were traveling had been improperly paved and finished causing them to overturn. A three-year-old passenger was killed and the other passengers were injured in varying degrees. Plaintiffs brought a wrongful death and negligence claim against the company responsible for the paving work. The jury returned $5 million on the wrongful death count, and awarded seven of the plaintiffs compensatory damages that far exceeded their actual medical expenses. The defendant sought judgment as a matter of law or new trial or remittitur. The trial court expressly found that the jury's verdict was supported by the evidence and that the verdict was not the result of bias, prejudice or passion. However, the trial court applied the *Hammond/Green Oil* factors to determine that the verdicts were shockingly excessive and must be reduced because the amounts of those verdicts greatly exceeded the plaintiff's actual medical expenses and therefore, had to represent primarily pain and suffering damages. The verdicts clearly included an amount for emotional distress resulting from the death of the three-year-old family member. The plaintiffs refused to accept remittitur and appealed.

Rachel Sanders-Cochran
Rachel Sanders-Cochran attended Cumberland Law School, where she graduated *cum laude* and was a member of the *Cumberland Law Review* and Curia Honoris. She practices with the Montgomery firm of Rushton, Stakely, Johnston & Garrett, P.A. She covers the civil decisions.

On appeal, the supreme court noted that the appropriate amount to award a plaintiff for pain and suffering is discretionary with the jury and unless that award is flawed in some way, a trial court may not simply conclude that the amount is excessive and order a remittitur. In this case, because the trial court had expressly determined that the jury's verdict was not flawed or biased or prejudiced in any way, the supreme court held that the trial court could not substitute its judgment in place of the jury's regarding the appropriate amount of damages to be awarded for pain and suffering. The supreme court held that the evidence supported the verdicts and reinstated all of the original awards.

The court also rejected the defendant's claim that the jury improperly awarded plaintiffs emotional distress damages resulting from the death of the three-year-old family member. Although the court recognized that damages for the mental anguish of family members is ordinarily not compensable in a wrongful death action, in this case, the wrongful death claim was tried along with plaintiffs' negligence claims. Because the plaintiffs were physically injured and were within the "zone of danger," they were entitled to seek damages for emotional distress resulting from the defendant's negligence. Thus, evidence of their grief and mental anguish caused by the three-year-old's death was highly relevant to their claim for damages.

Finally, the supreme court reiterated that the *Hammond/Green Oil* factors were inappropriate for consideration when reviewing an award of compensatory damages for excessiveness. In reviewing an award of compensatory damages, the focus should be on whether the plaintiff has been properly compensated, whereas in reviewing an award of punitive damages, the focus should be on the actions and position of the defendant. Because the *Hammond/Green Oil* factors focus on the actions and financial position of the defendant, those factors are applicable only to awards of punitive damages.

Antitrust; Alabama's antitrust statutes inapplicable to transactions involving interstate commerce

***Archer Daniels Midland Co. v. Seven-Up Bottling Co. of Jasper*, Ms. 1960220, 1999 WL 424336 (Ala., June 25, 1999).** In this case from Walker County, plaintiffs alleged that the defendants, all foreign corporations with principal places of business outside of Alabama, had engaged in a conspiracy to control the price of citric acid shipped into Alabama. Plaintiffs brought this action in state court alleging a violation of Alabama Code Section 6-5-60. The issue before the court was whether Section 6-5-60 provides a cause of action for an alleged conspiracy involving interstate commerce.

The supreme court concluded that Alabama's antitrust statutes are inapplicable when the transactions at issue involve interstate commerce. The court cited multiple justifications for its conclusion, noting that Alabama's antitrust statutes were enacted at a time when Congress was deemed to have the exclusive authority to regulate interstate commerce and when a federal antitrust statute was already in effect. Other factors found to support the court's interpretation of the statutes included the fact that the model for Alabama's antitrust statutes was held to be limited to transactions involving intrastate commerce; the original wording of Alabama's statutes included repeated references to "within this state"; Alabama appellate courts have consistently interpreted the statutes to govern only intrastate commerce; and the fact that, despite the limited reach given to Alabama's antitrust statutes by the Alabama appellate courts, the legislature has made no substantive changes to the statues since their enactment.

Recent Bankruptcy Decisions

Fifth Circuit discusses "first to file" rule

The Cadle Company v. Whataburger of Alice, Inc.; M. Louise Andrews, et al., 174 F.3d 599 (5th Cir. May 7, 1999) 34 BCD 369. The District Court dismissed RICO and state law claims of Cadle under the "first to file" rule. Cadle had filed in the district court as assignee of a judgment of over one million dollars against Andrews. After an adverse decision against Cadle which held that it did not legitimately own the judgment, Cadle appealed to the Fifth Circuit. On a motion to dismiss the appeal on the ground that Cadle did not own the judgment, the Fifth Circuit said it need not decide ownership because for the purpose of the appeal only, it could assume this as a fact. Cadle had claimed fraud between Whataburger and other of the defendants in conspiring to transfer assets from Andrews and leave Andrews execution-proof. When Andrews filed a chapter 7 case on June 14, 1994, Cadle filed several claims seeking to recover on its judgment. The bankruptcy court dismissed a complaint based on the judgment stating that the trustee actually owned the claim. Cadle then filed the instant complaint in the U.S. District Court claiming RICO violations, fraud, and tortious interference with its right to collect the judgment and to pierce the corporate veil of Whataburger. The defendants contended that the matter was already in bankruptcy, and, therefore, under the first-to-file rule, the district court had no jurisdiction. The district judge, in dismissing the case, agreed that he would not interfere with a collateral attack on a sister court, to-wit the bankruptcy court. Meanwhile, the bankruptcy court entered a "take nothing" judgment on all of Cadle's claims. The district cour, dismissing an appeal from the bankruptcy court, held that Cadle had no standing, as it did not own the claims.

There was then an appeal to the Fifth Circuit on the RICO and fraud claims brought originally in the district court. Cadle argued that the first-to-file rule should not have been applied because the bankruptcy court never had juris-

Wilbur G. Silberman
Wilbur G. Silberman, of the Birmingham firm of Gordon, Silberman, Wiggins & Childs, attended Samford University and the University of Alabama and earned his law degree from the University's School of Law. He covers the bankruptcy decisions.

diction. The appellate panel said the rule is a discretionary doctrine, but that since Cadle questions the contours of the rule, it would consider the matter *de novo*. It said that it would not consider ownership, but only the district court's decision to leave the matter with the bankruptcy court where it first originated.

The appellate court first considered the relationship between the first-to-file rule and collateral estoppel. In deciding that collateral estoppel did not apply, it rejected Cadle's argument as to lack of jurisdiction in the bankruptcy court. It said that jurisdictional uncertainty in the first filed court, standing alone, is no reason not to apply the rule, and therefore the district court was correct in refusing to accept the case. It then added a *caveat* that the *second* filed court should not only not decide the merits, but should determine whether the case is to be dismissed, stayed or transferred. It was of the opinion that the first filed court should decide if later filed similar issues should proceed before it. Thus, the district court should not have dismissed but should have remanded to the bankruptcy court for determination as to whether the second case should be continued in the bankruptcy court, and accordingly, it remanded the case to the district court with instructions for remand to the bankruptcy court.

Comment: Sometimes I wonder: Is not the bankruptcy court simply an adjunct to the district court? Was the second case "core" or "related to" jurisdiction? To prevent further appeal, would it have been in the interest of judicial economy for the district court to recall all of the proceedings concerning the controversy? Also, was the district judge correct in calling the bankruptcy court a "sister court," when the bankruptcy court is not an Article III court but a court of limited jurisdiction? In any event, because of prior rulings, probably it was clear that the bankruptcy court would not favor Cadle.

Eleventh Circuit says tax evasion discharge exception does not apply to conduct of debtor in evading payment of tax debt

Leroy Charles Griffith v. U.S.A., 174 F.3d. 1222 (11th Cir. May 11, 1999). I am sorry if the heading confuses you. If you are puzzled, then you missed the key word "payment." Here are the facts.

Leroy owned several corporations which dabbled in adult entertainment. In September 1988, the tax court found that he owed a considerable amount in back taxes, but fraud penalties were not imposed. Shortly thereafter, he formed a corporation by the name of New Wave, Inc. with his girlfriend, Linda, as sole stockholder. He later married Linda, and then transferred the shares of stock jointly to the two of them. This prevented a levy to collect the taxes, because assets held as tenant in the entirety are not subject to levy unless the judgment is against both. Then in January 1993, he filed a chapter 7 followed by a complaint to determine dischargeability of his back taxes. The IRS "screamed bloody murder," relying upon Bankruptcy Code §523(a)(1)(E). This subsection prohibits discharge "with respect to which the

debtor made a fraudulent return or willfully attempted in any manner to defeat such tax." The bankruptcy court agreed with the IRS, holding that "in any manner" was broad enough to include conduct amounting to evasion of *payment* of tax. After the bankruptcy court's holding, the Eleventh Circuit issued *In re Haas*, 48 F.3d. 1153 (1994), which held that the absence of the words "or the payment thereof" from §523(a)(1)(C), while §6531(2) of the I.R.C included such words, meant that while there cannot be a discharge to willfully attempt to evade or defeat the tax at the *assessment* stage, if such action occurs at the payment stage, discharge is not denied. There was an appeal to the district court which distinguished *Haas* stating that Griffith had made fraudulent transfers to defeat payment of tax. The Eleventh Circuit panel disagreed with this reasoning. It stated that if Congress had intended this distinguishing factor, it would have so written the law, that *Haas* is still the law, and that pursuant to the *Haas* panel, it must reverse. Having so held, it then commented that it was troubled by the result, and that it really felt it was wrong, but could do nothing else as under procedure it could not reverse another panel. In conclusion, it invited *en banc* reconsideration.

Comment: If you have a fraudulent transfer with similar facts, be very cautious in advice as to granting of discharge. I suggest we await an *en banc* decision of the Eleventh Circuit on this point where there is a good chance that the panel's holding will be overturned. Meanwhile, the lower courts have no choice but to grant the discharge.

Bankruptcy Code neither stays nor extends time to appeal tax assessment

Roberts v. Comm. of Int. Revenue, 175 F.3d 889 (11th Cir. May 4, 1999). John and Cheryl Roberts filed an appeal from the U.S. Tax Court which had determined them liable for additional taxes including fraud penalties for years 1982–1984. Timely petitions were filed with the tax court for re-determination. The tax court entered its decision on March 23, 1993. Previously, although not known by the tax court, on March 1, 1993, chapter 11 petitions had been filed by the Roberts. On July 15, 1993, the Commissioner, having learned of the prior filed bankruptcy petition, moved to vacate the tax court decision because bankruptcy was pending at the time of the decision. On July 19, the tax court vacated its prior decision. However, on September 29, 1993, the bankruptcy court lifted the automatic stay to allow proceeding with the tax court case "to permit the assessment, but not collection of any liability determined by the tax court." On November 10, 1993, the bankruptcy court dismissed the pending case, only to have another bankruptcy case filed on December 30, 1993. On March 7, 1994, notices of appeal to the Eleventh Circuit were filed from the tax court decisions.

On December 28, 1995, approximately one year later, the Eleventh Circuit dismissed the appeals on the basis that there was a lack of jurisdiction because the appeals were untimely. In order to meet this problem, the debtors requested that the bankruptcy court lift the automatic stay, which request was granted. The case was appealed to the Eleventh Circuit. The opinion of former Chief Judge Tjoflat was substantially as follows: IRC7482 provides for notice of appeal to be filed within 90 days after entry of the tax court's decision, which becomes final if no appeal notice is filed. Here, the tax court re-entered its decision of October 27, 1993. Notice of appeal was filed on May 3, 1996, some two and a half years later. The Commissioner contended that §362(a)(1)(8) or 108 of the Bankruptcy Code neither stayed nor extended sufficiently the 90-day period for appeal from the tax court decision. The Roberts conversely relied on §362(a)(1) as staying the "commencement or continuation...of a judicial, administrative, or other action or proceeding against the debtor... or to recover a claim against the debtor" and that the appeals were continuations of the assessment proceedings. The Commissioner asserted that §362(a)(1) did not apply because he did not file against Roberts, but that the Roberts filed a judicial proceeding against him on filing for a re-determination in the tax court, and that the tax court had no jurisdiction to assist the Commissioner in recovery of his claim. The Eleventh Circuit cited *Freeman v. Commissioner*, 799 F.2d 1091 (5th Cir. 1986) which held that an appeal from a tax court decision merely continues a judicial proceeding, initiated by the taxpayer, and, therefore, neither the proceeding nor the appeal is *against* the taxpayer. Conversely, the Ninth Circuit had concluded that such proceedings are *against* the taxpayer. The Eleventh Circuit rejected the reasoning of the Ninth Circuit.

The Eleventh Circuit stated that in *Freytag v. Commissioner*, 111 S.Ct. 2631, 2645, it was held that a tax court case is an independent judicial proceeding, and that the tax court has no executive, legislative or administrative power. It also reflected here that the case was initiated by the debtor, and, therefore, not against the debtor. It equated the tax court proceeding with filing for a refund, and then trying the case in the district court. Insofar as the tax court is concerned, it is a court of limited jurisdiction and powers, which, although in certain circumstances might enjoin collection, has no statutory authority to aid in collection; the government must bring suit for collection of a tax in the federal district court or a state court. Thus, the 90-day time for appeal was not stayed under §362(a)(1). The court further disposed of arguments that §362(a)(8) applied as to staying proceedings before the U.S. Tax Court on the ground that after the tax court re-entered its decision on October 27, 1993, there was no *proceeding* thereafter in the tax court. Finally, it determined that Bankruptcy Code Section 108(a) would not help Roberts, for although it extended the deadline until February 28, 1994, the notice of appeal was not filed until 1996.

Comment: The Eleventh Circuit rejected the Ninth's holding on similar facts, and approved that of the Fifth. In *Cadle*, 174 F.3d 599 (5th Cir. May 7, 1999) 34 BCD 369, the Fifth Circuit termed the bankruptcy court a "sister court." Both the bankruptcy court and tax court are Article I courts. Had the tax court here held for the Roberts, would the Commissioner have been allowed to appeal? Would the appeal have been against the Roberts, and, thus, enjoined? Also, the Eleventh Circuit equated the proceeding to filing for refund in the U.S. District Court after paying the money. Would the time for appeal also have run if bankruptcy had intervened? These are merely questions. I have no quarrel with the decision.

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